UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JIMMY RAY VALENTINE (04-2116); KENNETH JEROME VALENTINE (05-1877),

Petitioners-Appellants,

v. Nos. 04-2116; 05-1877

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
Nos. 99-00001; 05-00004—Richard A. Enslen, District Judge.

Argued: October 26, 2006

Decided and Filed: May 14, 2007

Before: MARTIN and COOK, Circuit Judges; BUNNING, District Judge.*

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* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Jennifer L. Swize, JONES DAY, Washington, DC, Timothy M. Holloway, Taylor, Michigan, for Appellants. Phillip J. Green, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Jennifer L. Swize, Lawrence D. Rosenberg, JONES DAY, Washington, DC, Timothy M. Holloway, Taylor, Michigan, for Appellants. Brian K. Delaney, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

COOK, J., delivered the opinion of the court, in which BUNNING, D.J., joined. MARTIN, J. (pp. 14-24), delivered a separate opinion concurring in part and dissenting in part.

OPINION

COOK, Circuit Judge. Jimmy Ray and Kenneth Valentine were convicted of conspiring to possess and distribute cocaine powder and crack cocaine. They now raise numerous challenges to their convictions pursuant to 28 U.S.C. § 2255. The Valentines, jointly and severally, make a number of arguments based on *United States v. Booker*, 543 U.S. 220 (2005). Largely for reasons this court articulated in *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005), these claims fail. Petitioners also make a number of ineffective-assistance claims, all but one of which lack merit. On that ground, we reverse and hold that Jimmy Ray Valentine is entitled to an evidentiary hearing to determine whether his trial counsel

thwarted his efforts to accept a plea bargain. We affirm the district court on all other grounds.

I. Background

A. Jimmy Ray Valentine

Jimmy Ray was convicted in February 2000 of conspiracy to possess with intent to distribute cocaine and cocaine base. His 292-month sentence resulted from the district court's finding him responsible for at least 1.5 kilograms of cocaine base. Jimmy Ray appealed his sentence, arguing, inter alia, that he should be resentenced in light of the Supreme Court's ruling in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). This court rejected that argument and affirmed his conviction, *United States v. Valentine,* 70 F. App'x 314 (6th Cir. 2003), which became final on October 20, 2003.

The following year, Jimmy Ray moved for relief under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. While his motion was pending in the district court, Jimmy Ray moved for leave to amend his petition to include an argument based on the intervening decision in *Blakely v. Washington,* 542 U.S. 296 (2004). The district court denied him leave to amend, concluding that *Blakely* did not apply to defendants on collateral review. The district court also denied his ineffective-assistance claims. Jimmy Ray then filed a notice of appeal and applied for a certificate of appealability, which the district court denied. While his application was pending, the Supreme Court announced its decision in *United States v. Booker,* 543 U.S. 220 (2005), to which Jimmy Ray directed this court's attention pursuant to Fed. R. App. P. 28(j). This court then granted a certificate of

appealability on both his ineffective-assistance arguments and his *Booker* claim.

B. Kenneth J. Valentine

Kenneth was tried with his brother Jimmy Ray and six other defendants, and was convicted of conspiracy to possess with intent to distribute cocaine base. Kenneth was sentenced to 292 months, predicated on the district court's finding that at least 1.5 kilograms of cocaine base were involved in the offense. Kenneth appealed, asserting, inter alia, arguments based on *Apprendi* and ineffective assistance of counsel. This court rejected his appeal in 2003, *Valentine,* 70 F. App'x at 314, and his conviction became final on January 26, 2004. Following the Supreme Court's issuance of *Booker,* Kenneth filed a motion pursuant to 28 U.S.C. § 2255, which the district court denied. Kenneth then appealed, and this court granted a certificate of appealability, allowing Kenneth to raise his ineffective-assistance and *Booker* claims.

II. *Apprendi/Blakely/Booker*

A. Procedural Issues

Although Jimmy Ray and Kenneth both rely on *Booker* to challenge aspects of their sentences, their cases arrive in different procedural postures. The merits of Kenneth's *Booker* challenge are properly before us, but Jimmy Ray's case arrives in the procedural posture of a denied motion for leave to amend. This distinction is irrelevant, however, because the district court based its ruling on the legal conclusion that Jimmy Ray's proposed amendment to include a *Blakely* argument would be futile as *Blakely* was inapplicable on collateral review, a conclusion we review de novo. *Parry v. Mohawk Motors of Mich.,*

Inc., 236 F.3d 299, 306 (6th Cir. 2000). The issue in both cases is essentially the same: Kenneth is entitled to relief if *Booker* is applicable to his case on collateral review, and Jimmy Ray is entitled to amend his petition to include a *Booker* argument if *Booker* applies on collateral review. Were *Booker* applicable to their cases, both Valentines state cognizable *Booker* claims entitling them to resentencing.

B. *Booker* Is a New Rule of Criminal Procedure: Jimmy Ray and Kenneth

Jimmy Ray and Kenneth both contend that the district court erred and that *Booker* applies to their cases on collateral review because *Booker* did not announce a "new rule" of criminal procedure. *Blakely* and *Booker* were mere applications of *Apprendi*, they argue, and not "new rules" for purposes of collateral review of their convictions, which became final after *Apprendi*.

In most instances, defendants seeking collateral relief may not rely on new rules of criminal procedure announced after their convictions have become final on direct appeal. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court announced a three-step analysis for determining when a new procedural rule will apply retroactively to cases on collateral review. As the Supreme Court explained in *Beard v. Banks*, 542 U.S. 406, 411 (2004) (internal citations omitted):

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the "legal landscape as it then existed," and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the

> rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

The *Beard* Court further explained that the second step of the *Teague* analysis asks "whether the [relevant] rule . . . was *dictated* by then-existing precedent-whether, that is, the unlawfulness of [petitioners'] conviction[s] was apparent to all reasonable jurists." *Id.* at 413 (internal citations omitted). Jimmy Ray's and Kenneth's convictions became final after *Apprendi* and prior to *Blakely*. Our *Humphress* decision addressed *Booker*'s retroactivity, however, and held that *Booker* does not apply retroactively to cases on collateral review. 398 F.3d at 860-63. The Valentines attempt to distinguish their case, however, on the ground that Humphress's conviction became final prior to *Apprendi* whereas their convictions became final after *Apprendi,* but before *Blakely* and *Booker*.[1]

But this argument ignores several key facts about the *Humphress* decision. First, the *Humphress* court actually decided that *Booker* was not dictated by *Blakely,* and therefore *Booker* created a "new rule" that could not be raised by defendants whose convictions became final at any time prior to *Booker*'s January 12, 2005, issuance. 398 F.3d at 860-62. If

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[1] In support of this distinction, the Valentines point to the *Humphress* court's framing of the issue before it: "We must therefore assay the legal landscape as of [January 2000] and ask 'whether the rule later announced in [*Booker*] was *dictated* by then-existing precedent-whether, that is, the unlawfulness of [respondent's] conviction was apparent to all reasonable jurists.'" *Humphress,* 398 F.3d at 860 (quoting *Beard,* 542 U.S. at 413).

Booker was a new rule despite *Blakely,* it follows that it was a new rule despite *Apprendi.* Put simply, the timing of *Apprendi* had no bearing on this court's decision in *Humphress.*

Second, the *Humphress* court pointed out that dissents in *Booker* made clear that *Booker*'s result was not preordained by *Blakely. See id.* at 861 (citing *Booker,* 543 U.S. at 334 (Breyer, J., dissenting) (opining that factual distinctions "offer a principled basis" for refusing to extend *Blakely* and *Apprendi* to the Federal Sentencing Guidelines)). The views expressed in dissent, as the *Humphress* court explained, were indicative of the *Booker* rule's "newness":

> Although Justice O'Connor observed that "Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b) and implemented in USSG § 5K2.0," *Blakely,* 124 S. Ct. at 2549 (O'Connor, J., dissenting), it was by no means a foregone conclusion that the rule in *Blakely* rendered the Federal Guidelines unconstitutional, as Justice Breyer's dissent in *Booker* proves. *Booker,* 125 S. Ct. at 802-03 (Breyer, J., dissenting).

Id. at 861 n. 2.

Third, the *Humphress* court also noted that "the differing interpretations of *Blakely* announced by the United States Courts of Appeals also indicate that not all reasonable jurists believed that the *Booker* rule was compelled by *Blakely.*" *Id.* at 861. The *Humphress* court pointed out that this circuit, in *United States v. Koch,* 383 F.3d 436 (6th Cir. 2004) (en banc), joined the "Second, Fourth and Fifth Circuits in holding that *Blakely* did not compel the

conclusion that the Federal Sentencing Guidelines violate the Sixth Amendment." 398 F.3d at 861 (citing *United States v. Mincey,* 380 F.3d 102 (2d Cir. 2004), *United States v. Hammoud,* 378 F.3d 426 (4th Cir. 2004) (en banc), and *United States v. Pineiro,* 377 F.3d 464 (5th Cir. 2004)). The court went on to explain:

> Even those Circuits that have applied *Blakely*'s rule to the Federal Guidelines have done so over dissents . . . . We are mindful of the observation in *Beard* that "[b]ecause the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new." *Beard,* 124 S. Ct. at 2513 n.5. We are confident, however, not only that the jurists who authored those majority opinions and dissents are reasonable, but that these opinions and dissents make it manifest that the rule of *Booker* is new.

Humphress, 398 F.3d at 861-62 (citations omitted).

To the extent that *Humphress* does not strictly control this issue because of the timing of Humphress's conviction vis-à-vis *Apprendi,* its reasoning remains persuasive. [2] Moreover, other courts of appeals have considered and rejected the same arguments in cases involving similarly situated petitioners whose convictions became final after *Apprendi. See, e.g., Never Misses A Shot v. United*

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[2] Indeed, although *Lang v. United States,* 474 F.3d 348, 353 (6th Cir. 2007), did not have occasion to address the issue as argued by the Valentines here, it could be read to foreclose this claim.

States, 413 F.3d 781, 782-83 (8th Cir. 2005) (petitioner whose conviction became final after *Apprendi* but before *Booker* could not raise *Booker* claims because "the 'new rule' announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings"); *Lloyd v. United States,* 407 F.3d 608, 612-14 (3d Cir. 2005) (same); *Guzman v. United States,* 404 F.3d 139, 142 (2d Cir. 2005) (same); *United States v. Price,* 400 F.3d 844, 848-49 (10th Cir. 2005) (holding that while *Blakely* interpreted *Apprendi,* it was not compelled by *Apprendi,* and thus petitioner whose conviction became final post-*Apprendi* but pre-*Blakely* could not raise *Blakely* claims on collateral review); *McReynolds v. United States,* 397 F.3d 479, 481 (7th Cir. 2005) ("*Booker* does not apply retroactively to criminal cases that became final before its release....*Blakely* reserved decision about the status of the federal Sentencing Guidelines . . . so *Booker* itself represents the establishment of a new rule about the federal system.").

We find the views expressed by this court in *Humphress* and those presented by our sister circuits persuasive. We therefore cannot conclude that "the rule later announced in [*Booker*] was *dictated* by then-existing precedent [such that] the unlawfulness of [petitioners'] conviction was *apparent to all reasonable jurists.*" *Beard,* 542 U.S. at 413 (second emphasis added). We hold that petitioners whose convictions became final prior to *Booker* may not rely on *Booker*'s rule on collateral review.

C. *Booker* Is Procedural, Not Substantive: Kenneth Only

Kenneth also contends that *Apprendi* and its progeny have "redefined the substantive law regarding federal narcotics prosecutions." Kenneth presumably makes this argument because the *Teague* rule of nonretroactivity does not apply to new substantive rules. *See Teague,* 489 U.S. at 311. As we noted in *Humphress,* however, "Without question, this rule is a procedural one," 398 F.3d at 860 n.1 (citing *Schriro,* 542 U.S. at 348), and Kenneth's argument fails.

D. *Booker* Is Not a "Watershed Rule of Criminal Procedure": Kenneth Only

Teague nonretroactivity contains a second exception for new rules of criminal procedure that are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard,* 542 U.S. at 417. This rule, as the Court in *Beard* pointed out, has "limited scope" and "is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* Moreover, the *Beard* Court explained that "because any qualifying rule would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge, it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*

Kenneth nevertheless argues that the "reasonable doubt rulings in the *Apprendi* line of cases establish a watershed rule that must be applied retroactively under *Teague* due to its impact on the truth-finding

function of a trial." But the Supreme Court's reasonable doubt rulings form the core of *Apprendi*; they are not a separate strand of principles which have not been analyzed for purposes of this issue. Moreover, this court addressed this issue in *Humphress,* holding that *Booker* did not create a watershed rule of criminal procedure. 398 F.3d at 863. This argument fails as well.

E. Application of Equity to *Booker* Issues: Kenneth Only

In his final *Booker* argument, Kenneth asks the court to create an equitable rule to allow defendants who raised an *Apprendi* argument on direct review to raise a *Booker* argument on collateral review. *Teague* forecloses such relief.

III. Ineffective Assistance of Counsel

A. Standard of Review

In reviewing a district court's ruling on a § 2255 petition, this court reviews findings of fact for clear error and conclusions of law de novo. *Paulino v. United States,* 352 F.3d 1056, 1058 (6th Cir. 2003).

B. The Intersection of 28 U.S.C. § 2255 and *Strickland v. Washington*

A prisoner who proves that the process leading to his conviction was tainted by an "error of constitutional magnitude" is entitled to relief under § 2255. *Weinberger v. United States,* 268 F.3d 346, 351 (6th Cir. 2001). The Valentines claim they were denied the effective assistance of counsel guaranteed by the Sixth Amendment. *See McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). Their challenges here are therefore governed by the well-known "performance" and "prejudice" standard established in

Strickland v. Washington, 466 U.S. 668 (1984). To establish constitutionally ineffective assistance of counsel, a petitioner must show that (1) his "counsel's representation fell below an objective standard of reasonableness," *Strickland,* 466 U.S. at 688, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

C. Trial Counsel's Alleged Failure to Communicate Jimmy Ray's Desire to Accept a Plea

1. Factual Background

Jimmy Ray claims that he learned in February or March 1999 that the government had offered him a ten-year plea arrangement, but his trial counsel advised him there was "no rush" to accept because he believed the government would make a better offer later in the proceedings. According to Jimmy Ray, however, the government made no additional offers, and he repeatedly told his trial counsel that he would like to accept the government's ten-year offer. Trial counsel ignored Jimmy Ray's wishes, he alleges, and took the case to trial in January 2000, where Jimmy Ray was convicted and sentenced to 292 months.

The government disputes Jimmy Ray's factual allegations, contending (1) that it never offered Jimmy Ray a ten-year plea agreement, and (2) that Jimmy Ray made his own decisions about his trial. The government points to a colloquy at Jimmy Ray's sentencing hearing in which defense counsel made the following representations to the district court:

> And he would have taken a deal, Your Honor, he would have taken a deal in a second had the Government chose to give him a crime that he felt

he was guilty of instead of something he wasn't. He adamantly maintained from day one, "I did not do this. I am no leader. I did not move millions of dollars worth of crack cocaine. I don't have millions of dollars. I don't even have thousands of dollars. I didn't do this." That's what he told me time and time again.

He is not a stupid man, but he is not a brilliant man, but he understands what I told him, "You go to trial and lose, it is life." I told him that. He will tell you that. He said, "I don't care, I didn't do what they say I did."

According to the government, this statement "establishes that the government never offered a ten-year plea agreement" to Jimmy Ray and that Jimmy Ray "was not kept in the dark on anything and freely made his own decision to go to trial." The government observes that Jimmy Ray maintained his innocence during his sentencing hearing, apparently implying that he would not have accepted any plea, had one been offered. Moreover, the government points out that Jimmy Ray had ten months in which to complain about his lawyer's alleged dereliction, but he made no complaints during pretrial proceedings, at trial, or at his sentencing hearing.

Jimmy Ray disputes the government's characterization of his counsel's statements at the sentencing hearing and contends that they illustrate his trial counsel's dishonesty. Jimmy Ray argues that his attorney's statement "that his client would have taken a deal 'had the Government chose[n] to give him a crime that he felt he was guilty of instead of something that he wasn't'" can be interpreted as an attempt by his attorney to "conceal his failure to

communicate Mr. Valentine's acceptance of the ten-year plea offer." Jimmy Ray also accuses the government of dissembling in its interpretation of his attorney's statement and his own statement at the sentencing hearing, which he maintains should be interpreted in the context of "disputing the Government's leadership charge," rather than as general claims of innocence.

2. Analysis

Jimmy Ray highlighted his claim in his § 2255 motion, but the district court denied him an evidentiary hearing on the matter. We need only determine whether Jimmy Ray is entitled to an evidentiary hearing to resolve whether the government offered him a plea that his lawyer essentially prevented him from accepting. If Jimmy Ray's trial counsel prevented him from accepting a plea, his assistance was clearly ineffective and, because the alleged plea agreement offered Jimmy Ray substantially less prison time (120 months rather than his 292-month sentence), he could show sufficient prejudice to satisfy *Strickland*'s second prong. The district court denied Jimmy Ray's claim, finding that the "[d]efendant has not presented specific, credible evidence supporting his claim [on this ground."] This court reviews that determination for abuse of discretion. *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999).

In reviewing a § 2255 motion in which a factual dispute arises, "the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999). "[T]he burden on the petitioner in a *habeas* case for establishing an

entitlement to an evidentiary hearing is relatively light." *Id.* More is required, however, than mere assertions of innocence. *See id.* ("[I]t would be nonsensical to conclude that the petitioner could meet that burden simply by proclaiming his innocence."). Nevertheless, "[a]n evidentiary hearing is required unless the record conclusively shows that the petitioner is entitled to no relief." *Arredondo*, 178 F.3d at 782 (internal quotations omitted). Stated another way, "no hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.* (internal quotations omitted).

We conclude, for several reasons, that Jimmy Ray met his burden, and the district court erred in declining to hold a hearing. First, although the government implies that Jimmy Ray's protestations of innocence discredit his argument that he was willing to accept a plea, this circuit has rejected this reasoning in the past. *See Griffin v. United States,* 330 F.3d 733, 738 (6th Cir. 2003) (citing *North Carolina v. Alford,* 400 U.S. 25, 33 (1970)) ("Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea."). This court has also explained that "[p]rotestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing." *Smith v. United States,* 348 F.3d 545, 552 (6th Cir. 2003).

Second, the authority relied on by the district court, *Moss v. United States,* 323 F.3d 445 (6th Cir. 2003), does not support its conclusion that a defendant's

affidavit alone could not present sufficient evidence supporting his request for a hearing. The *Moss* district court reached its conclusion only after an extensive three-day hearing on the evidence surrounding the defendant's ineffective-assistance and other claims. *Id.* at 453.

Third, the conclusions the government draws from Jimmy Ray's counsel's statement at his sentencing hearing are unsupported by the record. From the statement, "he would have taken a deal . . . had the Government chosen to give him a crime that he felt he was guilty of," the government draws the conclusion that "the Government never offered a ten-year plea agreement to the Defendant." But the government's reasoning is flawed. Taking the statement at face value, it proves only that Jimmy Ray was never offered a plea to a "crime that he felt he was guilty of," not that he was never offered a plea at all. The government's assertion may be correct, but it does not follow from the colloquy it quotes. Furthermore, it is strange that the government claims it never offered Jimmy Ray a plea, but then relies on an ambiguous statement by Jimmy Ray's counsel to prove this claim in its brief, rather than an affidavit from Jimmy Ray's trial counsel or its own trial attorneys who litigated the matter.

The defendant's burden to show his right to a hearing is significantly lower than his burden to show he is entitled to § 2255 relief. *See Turner,* 183 F.3d at 477. Here, Jimmy Ray offers more than a mere assertion of his innocence; he presents a factual narrative of the events that is neither contradicted by the record nor "inherently incredible." His claim may prove false at the evidentiary hearing, but it is

impossible to assess its veracity based on this record alone. The purpose of the hearing, however, is to allow the court to make these factual determinations based on more than a defendant's affidavit and the contrary representations of the government. Therefore, we reverse the district court's judgment on this issue and remand for an evidentiary hearing on this claim.

D. Jury Communication/Denial of Counsel: Jimmy Ray Only

1. Factual Background

Jimmy Ray alleges he was denied counsel during a critical stage of his trial. The relevant facts are as follows. The jury began deliberating at approximately 9:00 a.m. on Thursday, February 10, 2000. The next morning, when the jury reconvened to continue its deliberations, the court sent it the following message:

> Dear jury, there is no time limit nor is there any hurry in your deliberations. However, I must catch a plane today at 1:30. Therefore, if you do not have a verdict by 12:00, I will discharge you until Tuesday morning at 8:30, February the 15th, 2000.

The court did not contact the defendants' attorneys prior to delivering its message. During the morning, however, the court gave defense counsel an opportunity to submit a substitute note, which he declined. Court was reconvened later that morning after the jury delivered a note to the court indicating that it had reached a verdict on all but one defendant, and had deliberated about that defendant for six hours. Defense attorney Mitchell objected to the note, arguing that "it had the potential of creating a verdict before the verdict's time." The court overruled the

objection. The district court asked if the note made the jury feel rushed in reaching its verdicts, and the jury also answered "No." The jury then delivered its verdicts with respect to all defendants but one, and reconvened the following Tuesday to continue deliberations.

2. Analysis

In his brief, Jimmy Ray frames this scenario as a Sixth Amendment "denial of counsel" claim, rather than an instance of ineffective assistance by his trial counsel (his § 2255 petition argued both theories). Because the court gave its message to the jury after trying and failing to gather the defendants' lawyers, it is difficult for counsel to be considered ineffective. Thus, if Jimmy Ray is entitled to relief under this claim, it would be because he was denied counsel, not because counsel was ineffective.

Jimmy Ray invokes the principle that "denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega,* 528 U.S. 470, 483 (2000); *see also United States v. Cronic,* 466 U.S. 648, 659 n.25 (1984). Stated another way, denial of counsel is considered a "structural error," which entitles a defendant to a new trial without showing prejudice under *Strickland*'s second prong-prejudice is presumed because the error makes "the adversary process itself presumptively unreliable." *Cronic,* 466 U.S. at 659. Jimmy Ray must show that the district court's communication with the jury constituted a "critical stage" of the trial, recently defined by the Supreme Court as "a step of a criminal proceeding, such as an arraignment, that [holds] significant consequences for the accused." *Bell v. Cone,* 535 U.S. 685, 695-96 (2002). Because this

court has held that certain instances of jury "re-instruction" and the reading of supplemental instructions to the jury qualify as "critical stages," *see, e.g., Caver v. Straub,* 349 F.3d 340, 350 (6th Cir. 2003); *French v. Jones,* 332 F.3d 430, 436 (6th Cir. 2003), Jimmy Ray labels the district court's note an "instruction" given outside the presence of counsel. We reject this characterization. Cases in which this court has found denial of counsel at a critical stage invariably involve a court instructing the jury about the substantive elements of an offense or giving a deadlocked jury further instructions about how to proceed. *See, e.g., Caver,* 349 F.3d at 349 n.6 (counsel was absent when the jury was re-instructed "on certain elements of the offense after they had deliberated"); *French,* 332 F.3d at 430 (judge gave an improvised deadlocked jury instruction, later complained of as coercive, after hearing that the jury had reached a third impasse).

In this case, however, the note conveyed only scheduling information, with the caveat that jury need not hurry its deliberations-arguably not an "instruction" at all. The Tenth Circuit addressed a factually similar situation in *United States v. McMurry,* 818 F.2d 24 (10th Cir. 1987), where the defendant challenged a statement the trial judge made to the jury in the absence of his counsel as an improper *Allen* charge. After several hours of deliberations, the trial judge told the jury "that he had to catch a plane in several hours and that if it had not finished deliberating by then he would call a recess over the weekend and allow deliberations to continue the following week." *Id.* at 26-27. Although the procedural posture and claims at issue in *McMurry*

differ from this case, the Tenth Circuit's conclusion is informative:

> The statement was simply not an instruction at all . . . . The statement was made after the jury had deliberated about four hours on a Thursday and three hours on Friday. The judge had called the jury into the courtroom to discuss lunch arrangements. We must view this as no more than an explanation about the schedule for lunch and for subsequent deliberations. With the weekend having arrived it was necessary to give the jury a schedule for the balance of the day and the next week. The jury was entitled to such an explanation for its plans. It had nothing whatever to do with the length of deliberations but was, again, a needed schedule. The explanation can in no way be considered as an instruction.

Id. We view the district court's message in the same way, as not fitting within the category of jury instruction or re-instruction that demands the presence of counsel.

And though a coercive instruction could be characterized as a "critical stage," which holds "significant consequences for the accused," *Cone,* 535 U.S. at 695-96, we have held similar statements not coercive. *See United States v. Markey,* 693 F.2d 594, 597 (6th Cir. 1982); *see also Gibson v. United States,* 271 F.3d 247, 258 (6th Cir. 2001), *overruled on other grounds by United States v. Leachman,* 309 F.3d 377 (6th Cir. 2002); *United States v. Ratliff,* 63 F. App'x 192 (6th Cir. 2003) (unpublished opinion).

"In evaluating for coercive effect a judge's statement to the jury, this Court must consider the statement in context, assessing it under the totality of

the circumstances." *Gibson,* 271 F.3d at 258. In *Markey,* the defendant contended that the district judge "'coerced' the jury into reaching a speedy verdict [because the judge commented,] at the conclusion of trial, that the courthouse would be available the following morning (Christmas Eve) if the jury was unable to reach a consensus that afternoon." 693 F.2d at 594. The *Markey* defendant's coercion charge mirrors Jimmy Ray's: The court's message in both cases informed the jury that if it did not reach a verdict by a certain time, it would have to return to deliberate at a supposedly undesirable time, a holiday in *Markey* and several days later in Jimmy Ray's case. The court in *Markey* found that "the trial judge's charge was *not* 'likely to give the jury the impression that it was more important to be quick than to be thoughtful.'" *Id.* (quoting *United States v. Green,* 523 F.2d 229 (2d Cir. 1975)). Viewing this situation with the lens *Markey* provides, we are confident the message did not coerce the jury into reaching its verdict, its quickness notwithstanding. This court has repeatedly held that "the jury's speed in reaching a verdict is irrelevant to whether an instruction was coercive." *Ratliff,* 63 F. App'x at 195-96 (citing *United States v. Giacalone,* 588 F.2d 1158, 1168 (6th Cir. 1978)); *United States v. Tines,* 70 F.3d 891, 896 (6th Cir. 1995). Therefore, we deny his petition for relief on these grounds.

E. Ineffective Assistance of Appellate Counsel/ *Batson:* Jimmy Ray and Kenneth

1. Factual Background

Jimmy Ray and Kenneth claim their appellate counsel was ineffective for failing to appeal the district court's decision to allow the government's

peremptory challenge to a prospective juror, Carl Pratt. During jury selection, defense counsel objected under *Batson,* explaining that only two members of the panel were "people of color" and that one was already excused for cause. Defense counsel stated: "There is one other person and that's Mr. Pratt. I'd say that he is a black man. I don't know for sure, but he certainly looks like a black man to me. And he has been summarily excused by the prosecution."

The district court then requested a response from Assistant United States Attorney Brian Delaney. Delaney responded with surprise, apparently because he and none of the people sitting with him thought that Pratt "was a black man." The court then stated, "Your non-discriminatory reason for challenging him is because you did not know that he was an ethic [sic] minority; is that a fair statement?" Delaney responded, "That's true, but we had reasons why we dismissed him that had nothing to do with race." Delaney provided four reasons:

> [1] He is only 46 years old and he shows that he is retired. That kind of concerns me, someone who isn't working and involved in the community. [2] Another concern was that instead of getting workmen's comp if it was a back injury he had, he didn't even get any, it makes me wonder about the suspicious circumstances that might have surrounded his leaving work. Usually people who are legitimately injured get compensation for that loss, rightfully, and he did not, which makes me subject to think that perhaps there was something missing there. He said he had resigned from his employment. Just suspicious circumstances. I mean, it's not illegal to do it, but it makes me

> wonder about the person. [3] He failed to place in the upper-hand left corner or right corner the city from which he lived. [4] I did notice, it's just my own feelings, that he had an earring that we could notice in his left ear. I tend to kick some people off, males that have earrings, just because sometimes a lot of law enforcement officers wear them, but just as an idea of whether someone is conservative or not. That's somewhat unusual. That's the only male on the panel that's wearing an earring. And whether that is a good reason or not, it was one of the reasons.

The district court responded, correctly, that "it doesn't have to be a good reason, it has to be a non-discriminatory reason." He then gave defense counsel an opportunity to respond. Defense counsel responded to Delaney's worker's compensation reason by pointing out that

> Mr. Pratt told this court why he did not bother to get worker's comp. He said his wife had died last year and that he was getting over that and working through all that. There is nothing unusual about that. If Mr. Delaney is telling you that's his reason, I think it's not a good reason. I realize it's probably a non-discriminatory reason, but it's not a very good reason.

Defense counsel also discussed the earring: "[t]he fact he has an earring, I can't believe that's a reason the government goes around getting rid of people." Defense counsel continued, explaining that he is "looking for black people on my juries, especially when I look around and see eight black defendants sitting behind eight white lawyers. There ought to be black people on juries and I don't believe that this is a valid

reason for peremptory challenging this juror. I think they have expressed discriminatory reasons for getting rid of this." The court then asked, "What was the discriminatory reason they expressed?" Defense counsel responded, "The earring seems," to which the court replied, "White people wear earrings." Defense counsel then attempted again to articulate a rationale for his feeling that prosecutors challenged Pratt for a discriminatory reason:

> I can't express it, other than to say that what they've expressed is inadequate. It doesn't explain to me why they got rid of Mr. Pratt. There is no reason that I can see, other than the fact I think he is black and that's why they got rid of him. That's my belief.

The court concluded as follows:

> As far as Mr. Pratt is concerned, the Court's observations are that his race was unclear. He didn't put anything on his card, nor did he say that he was or was not a member of some race. Like Mr. Mitchell, I believe him to be a black man. But that's how I look at things. I have to accept the word of Mr. Lennon and Mr. Delaney and Mr. DiBrito when they tell me they did not think so. And for that reason the motion is denied.

The district court then offered defense counsel the opportunity to "cross-examine or examine people from the clerk's office who selected this jury" to give defense counsel the chance to investigate why there were only two black people on the panel. Defense counsel declined this opportunity. Before bringing the jury back into the courtroom, the court stated, "Mr. Delaney, I'll give you a chance to reconsider on Pratt. I think he was black. I'm not going to honor the

objection. But if you, now having been told he is black, want to invite him back on the jury, you may." Delaney responded, "I don't agree with the assertion that he is black. I mean, I don't understand that, Your Honor, by saying now that he is black. I mean, I can only say." The court then said,

> I'll let you in on a little tip. When I asked the question about are any of you black, he nodded affirmatively. He's the only person who did. I said, I don't think any of you are African-American, but I don't know. He clearly indicated he was an African-American. Clearly. But you had to be looking to see it. If you weren't looking, you didn't see it.

Delaney responded, "I can only say for the record I didn't see it, it never even crossed my mind, Your Honor." The court said, "Again, I'm inviting you to invite him back, but I'm not requiring you to." Delaney responded, "I would still, I mean, peremptory challenge I have non-discriminatory purpose for doing it and I'm going to stand by that." The court replied, "And I upheld it. Bring the jury back without Mr. Pratt. Tell him he is excused."

2. Analysis

Defendants raising claims of ineffective assistance by appellate counsel must meet *Strickland*'s two-prong test. *McFarland v. Yukins,* 356 F.3d 688, 699 (6th Cir. 2004). In the appellate context, the court must first assess the strength of the claim appellate counsel failed to raise. "Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *Id.* As the court in *McFarland* explained, "[i]f there is a

reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, we can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel." *Id.* at 700. In order to assess the effectiveness of Jimmy Ray's and Kenneth's appellate counsel, then, the court must first consider whether a *Batson* claim on appeal had a reasonable probability of success. Applying this court's precedent to the facts in the record, a *Batson* claim had little probability of success.

The Equal Protection Clause prohibits a prosecutor's use of peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky,* 476 U.S. 79 (1986). In assessing *Batson* claims, we employ a three-step analysis: "Under *Batson,* a defendant must first establish a prima facie case showing that the prosecution exercised peremptory strikes on the basis of race. If the defendant satisfies this requirement, the prosecution must articulate a race-neutral explanation for the challenges. The trial court must then decide if the defendant has carried the burden of proving purposeful discrimination." *United States v. Tucker,* 90 F.3d 1135, 1142 (6th Cir. 1996) (citing *Batson,* 476 U.S. at 96-98).

In assessing the prosecutor's articulated reasons, the Supreme Court has provided, and the district correctly recognized, that "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible . . . . [T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race

neutral." *Purkett v. Elem,* 514 U.S. 765, 767-68 (1995). Our review of the district court's resolution of the ultimate issue-whether the defendant has established purposeful discrimination-is limited: "[b]ecause this determination turns largely on the evaluation of credibility, reviewing courts give the findings of the district court great deference." *United States v. Harris,* 192 F.3d 580, 586 (6th Cir. 1999) (citing *Batson,* 476 U.S. at 98 n.21). "We may reverse that finding of fact only where we find *clear error.*" *United States v. Hill,* 146 F.3d 337, 341 (6th Cir. 1998) (citing *Hernandez v. New York,* 500 U.S. 352, 369 (1991)) (emphasis added). As the Supreme Court counseled in *Purkett,* "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." 514 U.S. at 768.

Although the district court in this case could have provided a more precise analysis of the issue, the record reveals no clear error in the court's finding that there was no discrimination. The prosecutor articulated several reasons, none of which contained discriminatory undertones or implications. The district court considered the government's reasons and provided defense counsel the opportunity to meet his burden by showing a discriminatory implication in Delaney's statements, but defense counsel did not meet his burden and instead merely said that he had a "belief" that the government's reasons were discriminatory. This "belief" does not meet defense counsel's "ultimate burden of persuasion regarding racial motivation[, which] rests with, and never shifts from, the opponent of the strike." *Id.* The district court ultimately denied the objection, stating that Pratt's race was unclear and he "had to accept the

word" of the prosecutors that they were unaware of Pratt's race and thus did not strike him for that reason. In other words, the district judge found Delaney's explanation credible, and this kind of determination is given "great deference." *Harris,* 192 F.3d at 586 (citing *Batson,* 476 U.S. at 98 n.21). Therefore, the district court's *Batson* ruling was not clear error.[3] Given this conclusion, Jimmy Ray's and Kenneth's ineffective-assistance-of-appellate-counsel claims must also fail, as they cannot show that their appellate counsel failed to include an issue that had a reasonable probability of changing the result of the appeal. *See McFarland,* 356 F.3d at 699.

IV. Conclusion

We affirm the district court's denial of Jimmy Ray's and Kenneth's challenges based on *Booker,* and their ineffective-assistance claims, but we reverse the district court's decision denying Jimmy Ray an evidentiary hearing on whether his trial counsel denied him the opportunity to accept a plea bargain and remand to the district court for a hearing on this issue.

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[3] The record is unclear why the district court then asked Delaney if he would like to voluntarily invite Pratt back on the jury, given that the court ultimately decided that Pratt was black. The record is clear, however, that the district court maintained its initial ruling on the issue, and we review that ruling.

CONCURRING IN PART, DISSENTING IN PART

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part and dissenting in part. I join the result reached by the majority, except for its conclusion in Part II.B. regarding the retroactive application of the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). The majority's analysis presents this issue fairly, and finds support in our precedent. Even so, I dissent to underscore what I believe to be an important theoretical difference that I have regarding *Booker*'s retroactive application.

I have previously written, and continue to believe, that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), commanded the Supreme Court's subsequent decisions in *Blakely v. Washington,* 542 U.S. 296 (2004), and *Booker. See United States v. Koch,* 383 F.3d 436, 443 (6th Cir. 2004) (en banc) (Martin, J., dissenting) ("The seeds of *Blakely* were sown in *Apprendi*[ ], in which the Supreme Court held that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"). The Supreme Court confirmed this belief in *Booker* itself when it stated, succinctly and unequivocally, that "we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury

beyond a reasonable doubt." *Booker,* 543 U.S. at 244. As I am inclined to think the Court meant what it said, I believe that neither *Blakely* nor *Booker* created a new rule, but merely applied the rule already laid down in *Apprendi.* The rule from *Booker* should therefore apply retroactively to habeas petitioners, like the Valentines, whose convictions became final **after** the Court issued its decision in *Apprendi.*

I.

At the outset, I do not believe that this Court's decision in *Humphress v. United States,* 398 F.3d 855 (6th Cir. 2005), controls the result here. The conviction of the defendant in *Humphress* became final **before** the Supreme Court's decision in *Apprendi,* as the majority acknowledges. As a result, the question faced by the panel in *Humphress* was not, as it is here, whether *Apprendi* dictated the result in *Booker,* but rather whether the rule from *Booker* was dictated by precedent that predated *Apprendi.* I agree with the end result reached in *Humphress* because I believe that *Apprendi* itself announced a new rule, and that petitioners whose convictions predated this decision would be barred from obtaining relief under *Apprendi, Blakely,* or *Booker.* To the extent that the *Humphress* panel discussed whether *Blakely* or *Apprendi* dictated the result in *Booker,* however, this analysis is dicta, as it was unnecessary to reach the conclusion that no precedent at the time the petitioner's conviction became final (before *Apprendi*) dictated the result in *Booker.*[1] *See Central Virg. Cmty.*

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[1] This is not to suggest that the *Humphress* opinion somehow overreached or was off-base for the analytical approach that it

College v. Katz, 546 U.S. 356 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.") (citing *Cohens v. Virginia,* 19 U.S. 264 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.")). The panel's view in *Humphress* may well be informative with respect to the question of whether reasonable jurists believed *Booker* was compelled by *Blakely* for purposes of examining *Booker*'s retroactive application under *Teague v. Lane,* 489 U.S. 288 (1989). It does not, however, act as a binding precedent from this Court on the issue we face here.[2]

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followed. If, as the panel clearly believed, *Blakely* and *Apprendi* did not dictate *Booker,* then it naturally follows that no pre-*Apprendi* precedent dictated *Booker* either. This may have been a simple way of reaching its conclusion regarding *Booker*'s retroactive application to a pre-*Apprendi* conviction. Nevertheless, this portion of its reasoning went beyond the precise question presented to the panel, and does not bind us to follow it.

[2] Nor is it clear to me why the majority suggests that *Lang v. United States,* 474 F.3d 348, 353 (6th Cir. 2007), "could be read to foreclose" the "issue as argued by the Valentines here." Maj. Op. at 4. As the majority acknowledges, *Lang* in no way addressed whether *Booker* was dictated by *Apprendi,* apparently because the petitioner in *Lang* did not raise this argument. The majority's suggestion that *Lang* is somehow controlling would allow precedential decisional law to be created on a given issue where a losing party fails to raise that issue, simply because the facts or procedural posture of his case would theoretically have

Under *Teague,* "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Thus, if the rule from *Booker* was new, and not dictated by *Apprendi,* there is little doubt that the petitioners here could not benefit from it, as it was not part of the legal landscape at the time of their convictions (leaving to the side for now any discussion of the *Teague* exceptions). *See Beard v. Banks,* 542 U.S. 406 (2004). The majority effectively catalogues a number of judicial opinions that like *Humphress,* concluded that *Apprendi* did not dictate *Booker,* either in holdings or in dicta. These opinions are relevant to show that not all reasonable jurists believed in the inevitability of *Booker,* which, under *Teague*'s progeny, indicates that *Booker* created a new rule after the petitioners' convictions became final and from which they cannot now benefit. *See Beard,* 542 U.S. at 413. Under this conventional approach, even if all the members of our panel were inclined to believe that *Booker* was dictated by *Apprendi,* the fact that many of our colleagues previously believed otherwise would render the rule from *Booker* new, despite our current beliefs to the contrary. This leads me to ponder a question that I am not sure has been answered by the Supreme

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allowed him to raise it. Essentially, by failing to raise the argument and losing his case on other grounds, the *Lang* petitioner would not only waive the unlitigated claim in his own case, but would close the door on that claim on behalf of all other, similarly situated habeas petitioners. This is a legal principle with which I, at least, am unfamiliar.

Court or this Court: Does the "apparent to all reasonable jurists" inquiry, which is relevant under *Teague* and its progeny to determining a rule's "newness," apply with the same force to a strictly federal rule of criminal procedure, raised in a habeas challenge to a federal conviction under 28 U.S.C. § 2255, as it does in habeas proceedings addressing state convictions under 28 U.S.C. § 2254?[3]

Teague itself arose in the context of a habeas review of a state court conviction, and did not address the appropriate retroactivity analysis in habeas reviews of federal conviction. 489 U.S. 288, 328 (Brennan, J., dissenting) ("The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners."). The *Teague* majority justified its rule against the retroactive application of new rules of

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[3] Other Courts of Appeals have concluded that *Teague* applies to section 2255 petitions, and have not acknowledged any difference between the analysis for habeas petitions seeking relief from federal convictions versus those seeking relief from state convictions. *See Daniels v. United States*, 254 F.3d 1180, 1194 (10th Cir. 2001); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990). As Justice Brennan pointed out in his dissent in *Teague*, however, the Court's opinion had nothing to do with section 2255 petitions. 489 U.S. at 328 (Brennan, J., dissenting); *see also United States v. Payne*, 894 F. Supp. 534, 542 (D. Mass. 1995) (ruling that *Teague* does not apply in section 2255 cases.). I would not take issue with the general conclusion reached by other courts that *Teague* is **relevant** to the retroactivity inquiry in habeas petitions brought by federal prisoners; rather, as discussed below, I think that its application should be somewhat different in this context.

criminal procedure on two grounds: (1) **comity** toward state court adjudications, and (2) the **finality** of criminal judgments. *Teague,* 489 U.S. at 308 ("[W]e have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review."); *Beard,* 542 U.S. at 412 ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant 'habeas corpus relief to . . . state prisoner[s]' . . . . This should make clear that the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts."). Only one of these justifications-the finality of criminal judgments-is relevant in habeas cases seeking relief from convictions in federal court.

Teague's concern with finality on its own likely supports the general rule of applying the case's basic premise to section 2255 petitions. That is to say that as a general matter, as with state court prisoners, federal prisoners should only be able to rely on rules that were part of the legal landscape at the time their convictions became final, based on the value of repose, and the importance of having some eventual end-point in all litigation. Because concerns with comity are reduced-if not nonexistent-in the context of section 2255, however, it would seem to me that a bit more scrutiny is warranted in determining what the legal landscape actually was, and whether a given rule was "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague,* 489 U.S. at 301 (emphasis in original).

As discussed above, the "dictated by prior precedent" inquiry typically turns on whether reasonable jurists, in cases prior to the decision in

which the "new rule" was announced, would have deemed its outcome to be ordained by then-existing precedent. *See, e.g., Beard,* 542 U.S. at 413 (grounding the inquiry in whether "the unlawfulness of [respondent's] conviction was apparent to all reasonable jurists"); *Humphress,* 398 F.3d at 860 (same). This deferential approach might make good sense in the section 2254 context. Its focus on the divergent opinions of federal and state court judges recognizes that sometimes reasonable minds can differ over the development of legal rules. In such instances, where the application of an existing rule to a somewhat nuanced situation is debatable, the state courts should not necessarily be subject to Monday-morning quarterbacking every time they are eventually proven wrong on an issue. *See, e.g., Beard,* 542 U.S. at 412 ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant 'habeas corpus relief to...**state** prisoner[s].'") (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (emphasis added)); *id.* at 423 (Souter, J., dissenting) ("[T]he function of *Teague*'s reasonable-jurist standard is to distinguish those developments in this Court's jurisprudence that **state judges** should have anticipated from those they could not have been expected to foresee." (emphasis added)); *Butler v. McKellar,* 494 U.S. 407, 414 (1990) ("The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents **made by state courts** even though they are shown to be contrary to later decisions."(emphasis added)). This concern is explicitly recognized in *Teague*: "**[s]tate courts** are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new

constitutional commands." 489 U.S. at 310 (quoting *Engle v. Isaac,* 456 U.S. 107, 128 n.33 (1982) (emphasis added)).

These quotations clearly reveal that the standard new rule inquiry and its reference to opinions of reasonable jurists is largely based on concerns with federalism and comity, and demonstrates deference to reasonable state court interpretations of the law. Even where the "reasonable jurists" to whom we look for guidance are federal judges, their opinions can serve as a proxy for whether a similar state court decision was reasonable. So long as state courts are applying Supreme Court case law in good faith, there is diminished justification for burdening their quasi-sovereign judicial machinery with the retroactive application of new rules in cases that have become final.

In a section 2255 case, however, where comity and federalism are irrelevant, there is much less need to defer to the divergent views of federal judges who, in hindsight, did not correctly apply existing precedent to a new case. We are, after all, members of inferior courts established by the same sovereign (unlike state court judges), and if the Supreme Court says we were wrong, we should take our medicine and gladly apply the correct rule retroactively, rather than clinging to vacated misapplications of the law to prove that a Supreme Court rule is "new" (which conveniently allows us to convince ourselves that we could not have been wrong in the first place). Nor can our difference of opinion serve as a proxy for why a prior, now invalidated decision should be deferred to as a reasonable application of the Constitution, as it might in the section 2254 context.

In fact, a less deferential approach in section 2255 cases to the divergent opinions of reasonable jurists than in section 2254 cases would parallel the standard of review codified by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Specifically, section 2254(d)(1) imposes a very deferential standard of review in habeas cases challenging state court convictions, allowing reversal only where the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This provision has no counterpart providing a standard of review in section 2255 cases, and they are generally reviewed de novo. *See Moss v. United States,* 323 F.3d 445, 454 (6th Cir. 2003).[4] The

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[4] *Moss* refers to the standard by which our Court of Appeals reviews a district court's disposition of a section 2255 petition, rather than how the district court reviews the prior, direct proceedings in the underlying criminal case. But the fact that the district court in which the petition is filed is usually the same court that originally handled the case, and has the opportunity to correct any errors it may have made, without showing any sort of awkward deference to its own earlier decision, indicates even less concern with deference in the first instance. *See Weinberger v. United States,* 268 F.3d 346, 351 (6th Cir. 2001) ("A motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid."). Further, some claims, such as those for ineffective assistance of counsel, can only be heard in the first instance in a petition for habeas relief under section 2255, *see United States v. Aguwa,* 123 F.3d 418, 423 (6th Cir. 1997), providing additional support for the view of such a petition as part of the ongoing adjudication of a federal criminal case, rather

different standard of review used in habeas petitions challenging state court convictions versus that used in petitions challenging federal convictions supports, at least by analogy, a similar context-based difference in the manner in which *Teague* applies to determine a rule's newness.

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than some separate, isolated proceeding, the conclusions of which are entitled to some sort of deference.

Another judge who has questioned *Teague*'s applicability in federal habeas cases has suggested that concerns of both comity and finality are diminished in section 2255 cases, in light of the fact that to a large extent, they are a continuation of the original federal criminal proceeding, rather than a purely separate and distinct lawsuit:

> To this Court, the difference in the nature of proceedings under sections 2254 and 2255 precludes application of *Teague* to federal prisoners, at least in the present circumstances:
>
> > In contrast to the "civil" and "collateral" section 2254 remedy for state prisoners, the section 2255 remedy for federal prisoners bears the markings of an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality. This characteristic of section 2255 proceedings creates the possibility, ignored by most courts and commentators that have faced the issue, that *Teague* does not apply in section 2255 proceedings....
>
> The legislative history of section 2255 supports the view that 2255 actions are part of the criminal proceedings and that the conviction or sentence is not "final" until disposition of the habeas petition.

Payne, 894 F. Supp. at 543 (quoting James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 22A.6, at 272-74 (Michie Supp. 1993), and Rules Governing Section 2255 Proceedings in the United States District Courts, 1 Advisory Committee Note (1976 Adoption) (2255 motion "is a further step in the movant's criminal case and not a separate civil action")).

This is all to say that there would be good reason to conclude that in section 2255 cases, divergent past opinions of "reasonable" jurists should not be enough to demonstrate that a rule is new.[5] This approach would not undermine the central premise of *Teague*'s general rule against retroactivity. Rather than hanging onto the now-vacated opinions of reasonable jurists, I would focus primarily on the straightforward question of whether the new decision "simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Penry v. Lynaugh,* 492 U.S. 302, 314 (1989) (quoting *Mackey v. United States,* 401 U.S. 667 (1971) (Harlan,

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[5] This view might seem somewhat novel among federal judges, but I would note that at least one commentator has made similar observations pertaining to "*Teague*-light" in federal habeas petitions:

> [U]nlike motions filed under the state habeas statute, which are governed by 2254, 2255 motions are filed in the federal district court that originally imposed the sentence. Consequently, the great fear in *Teague* that retroactivity would upset federal-state relations by interfering with the finality of state court judgments and unduly burdening state court systems with rehearings is simply not present with 2255 motions. As recently as 2004, the Court acknowledged that the justification for the *Teague* ban hinged on the fact that *Teague* involved state habeas petitioners. [citing *Beard*] . . . In the wake of *Blakely* and *Booker,* however, lower federal courts and commentators seem oblivious to the difference between state and federal habeas challenges and why each might fare differently under the principles of *Teague.*

Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System,* 2005 Wis. L.Rev. 1137, 1167 (2005).

J., concurring in part and dissenting in part)). To the extent there is a need to articulate what my "federal-*Teague*" or "*Teague*-light" standard would be, this language from *Penry* would encapsulate it precisely.

II.

This discussion brings me to the question of whether *Booker* created a new rule. In my mind, there can be little argument that *Booker* did nothing more than "simply appl[y] a well-established constitutional principle [the rule from *Apprendi*] to govern a case which is closely analogous." The well-established constitutional principle is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. The closely analogous question presented in *Booker,* was, in the Court's own words, "whether our *Apprendi* line of cases applies to the sentencing guidelines."[6] 543 U.S. at 229.

Justice Stevens's opinion for the Court in *Booker*-the portion of the opinion that addressed the constitutionality (but not the remedy) of mandatory application of the Federal Sentencing

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[6] The Court explained the issue somewhat more thoroughly by quoting the first question presented: "[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." 543 U.S. at 229 n.1.

Guidelines-made explicit that it was a straightforward application of *Apprendi* to the Sentencing Guidelines, rather than the creation of a new rule: "we **reaffirm our holding in *Apprendi***: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244 (emphasis added). I am mindful of the Supreme Court's warning that "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague.*" *Butler,* 494 U.S. at 415. Even so, *Booker* did not create a new rule because it did not "break new ground." *Teague,* 489 U.S. at 301. Instead of creating some new principle of law, or making an extension of the law that was "controlled" by a prior holding, it simply applied the same legal principles it had articulated in *Apprendi* and *Blakely* to a new sentencing scheme: "More important than the language used in our holding in *Apprendi* are the **principles** we sought to vindicate. Those **principles** are unquestionably applicable to the Guidelines." *Booker,* 543 U.S. at 238 (emphasis added). Revolutionary as the holding in *Booker* may have seemed, the true upheaval actually occurred in *Apprendi* through its resuscitation of the Sixth Amendment jury trial right.

Unlike today's majority and the *Humphress* Court, I am unconvinced that the dissents in *Booker* and *Blakely* were "indicative of the *Booker* rule's 'newness.'" Although I tend not to engage in the

practice of counting justices, it is apparent from a review of the opinions in these cases and *Apprendi* that the dispute between justices is over the fundamental premise of *Apprendi* rather than whether or not it foreordained *Booker*'s constitutional holding. This observation is based not only on the identities of the individual dissenters, but the legal principles they relied upon in each of the three cases. *See, e.g., Apprendi,* 530 U.S. at 543-544 (O'Connor, J., dissenting) ("The actual principle underlying the Court's decision . . . would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines)."); *id.* at 565 (Breyer, J., dissenting) ("As Justice O'Connor points out, the majority's rule creates serious uncertainty about the constitutionality of such statutes and about the constitutionality of the confinement of those punished under them."); *Blakely,* 542 U.S. at 323, 324-25 (O'Connor, J., dissenting) ("It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines . . . . The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, . . . and Congress has unfettered control to reject or accept any particular guideline. The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for

distinction."); *id.* at 346 (Breyer, J., dissenting) ("Taken together these three sets of considerations, concerning consequences, concerning history, concerning institutional reliance, leave me where I was in *Apprendi, i.e.,* convinced that the Court is wrong."); *Booker,* 543 U.S. at 327, 330 (Breyer, J., dissenting) ("The Chief Justice, Justice O'Connor, Justice Kennedy, and I have previously explained at length why we cannot accept the Court's constitutional analysis . . . .The upshot is that the Court's Sixth Amendment decisions-*Apprendi, Blakely,* and today's-deprive Congress and state legislatures of authority that is constitutionally theirs."); *see also id.* at 288 (Stevens, J., dissenting in part) ("In reality, the [remedial] majority's concerns . . . are nothing more than an objection to *Apprendi* itself.").

Of course, Supreme Court justices have the luxury of being able to vote to overturn the Court's prior precedent, unlike the rest of us who must fall in line once the magic number of five votes is cast. There is no reason for us to be surprised by the *Apprendi* dissenters' continued opposition to the rule from that case, which is justified by both their viewpoints and their jobs. A candid look at the differences of opinion between the Justices in these three cases does not suggest to me, however, anything more than an ongoing dispute over the premise underlying *Apprendi.* Therefore, I cannot read their divergent

viewpoints regarding *Apprendi* to suggest that it did not command the result in *Booker*.[7]

In fact, the *Apprendi* dissenters said at the time of the decision that it would require reversal of the Guidelines, as quoted above. Further, like the *Booker* constitutional majority eventually held, the *Apprendi*

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[7] There are many areas of the law where particular Supreme Court justices have continued to argue against a certain legal rule even after it is established as precedential authority. As an example, for fourteen years after the Court declared in *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) that "the punishment of death does not invariably violate the Constitution," Justices Brennan and Marshall adhered to their dissenting opinions from *Gregg* that the death penalty always violates the Eighth and Fourteenth Amendments. *See, e.g., Walton v. Arizona*, 497 U.S. 639, 674-75 (1990) (Brennan, J., with whom Marshall J., joins, dissenting) ("I also adhere to my view that the death penalty is in all circumstances a cruel and unusual punishment.") (citing *Gregg*, 428 U.S. at 230-31 (Brennan, J., dissenting)). In fact, a Lexis-Nexis search for "Dissentby (Brennan) and Dissentby (Marshall) and death penalty" yields 1440 cases since 1976, the vast majority of which appear to contain the oft recited phrase "[a]dhering to our views that the death penalty is in all circumstances cruel and unusual punishment pro[h]ibited by the Eighth and Fourteenth Amendments...." *See, e.g., Boggs v. Muncy*, 497 U.S. 1043 (1990). Well placed as their arguments may have been, it would be an uphill battle to point to this entrenched resistance by these two esteemed justices as diminishing the precedential significance of *Gregg*, or as indicating that the death sentences of subsequent litigants were somehow less controlled by the Court's prior death penalty jurisprudence.

See also Gonzales v. Carhart, 550 U.S.___, Nos. 05-380 and 1382 (2007) (Thomas, J., joined by Scalia, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has no basis in the Constitution.").

dissenters made clear that any distinctions based on the structure or the source of authority (administrative versus legislative) of the federal guidelines was not a meaningful one.[8] For their part, the majority opinions in *Apprendi* and *Blakely* only stated that the federal guidelines were not in front of the Court, rendering it impossible to make any judgment with regard to the constitutionality of their application.[9] 530 U.S. at 497 n.21. Five years later, the dissenters' prediction proved correct, in a remarkably straightforward application of *Apprendi* to the Sentencing Guidelines. I therefore believe that

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[8] It seems that the United States had accepted this reality as well after *Apprendi*, or at least by the time *Blakely* was argued in the Supreme Court. *See Blakely*, 542 U.S. at 305 n.9 ("The United States, as amicus curiae, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant.").

[9] As the majority points out, other federal courts have pointed to the Supreme Court's "reserving judgment" on the constitutionality of the guidelines in *Apprendi* and *Blakely* in support of their determination that *Booker* created a new rule. *See, e.g., McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005). In my mind, these statements about reserving judgment have nothing to do with the newness inquiry. It is a fundamental principle of the judicial process that courts can only consider one case at a time, *see Griffith v. Kentucky*, 479 U.S. 314, 323 (1987), and the Supreme Court's refusal to reach past the case presented to it has little to do with whether the opinion in one case dictates the result in a subsequent case. The Seventh Circuit's reasoning in *McReynolds* would essentially mean that every Supreme Court decision announces a "new rule," except in the unlikely scenario where the Court grants certiorari to hear a case presenting an issue identical to one it has already decided and then decides it in an identical fashion.

Booker "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Penry,* 492 U.S. at 314.[10]

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[10] Although the focus of my dissent is that *Booker* should apply retroactively to convictions that became final after *Apprendi* because it did not create a new rule, a strong argument can also be made that *Booker* fits into one of the exceptions to *Teague*'s general prohibition of the retroactive application of new rules. *See* David E. Johnson, Note, *Justice for All: Analyzing Blakely Retroactivity and Ensuring Just Sentences in Pre-Blakely Sentences,* 66 Ohio St. L.J. 875, 908-22 (2005). Specifically, where a new rule is deemed a "watershed rule [ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," it still can apply retroactively. *Beard,* 542 U.S. at 417 (quoting *O'Dell v. Netherland,* 521 U.S. 151, 157 (1997)). The command from *Apprendi, Blakely,* and *Booker* that facts necessary to support a sentence beyond the maximum authorized by a conviction "must be admitted by the defendant or proved to a jury beyond a reasonable doubt," would clearly appear to amount to a rule implicating fundamental fairness and accuracy.

The Supreme Court has partially rejected this argument, holding that assignment of the factfinding role to a jury, rather than a judge, does not necessarily increase the accuracy of a criminal proceeding. *Schriro v. Summerlin,* 542 U.S. 348, 356 (2004) ("[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate."). In holding that *Booker* was a new rule, our Circuit's *Humphress* opinion relied on *Schriro*'s conclusion that a jury does not necessarily make more accurate factual determinations than a judge. *Schriro,* however, did not analyze the separate but related requirement of *Apprendi* that facts necessary to the sentence must be found beyond a reasonable doubt. *See Johnson,* 66 Ohio St. L.J. at 915. *Humphress* did not account for the increased standard of proof required by *Apprendi.* Raising the standard of

III.

It is easy to lose sight of, but essential to bear in mind, what the Court meant when it "reaffirmed" its holding from *Apprendi* in *Booker,* and why and to what extent, for purposes of retroactivity, *Booker* applied the holding from *Apprendi.* *Booker*'s remedial resolution to the Constitutional problems created by mandatory application of the Federal Sentencing Guidelines was delivered in a complicated opinion that continues to cause confusion for the lower federal courts two years after it was decided. Although in my view *Booker*'s constitutional holding resulted from a straightforward application of *Apprendi,* anyone who could have predicted the case's remedial holding would have been several steps ahead of the proverbial reasonable jurist, if not a bona fide fortune-teller.[11]

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proof from the pre-*Booker* preponderance of the evidence to the *Apprendi*-mandated beyond a reasonable doubt must clearly have a profound effect on the accuracy of sentencing procedures. *Id.* at 915-22; *see also In re Winship,* 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error.").

[11] In a particularly thorough opinion, United States District Judge William Young of the District of Massachusetts has set forth an insightful historical account of the developments leading up to the *Booker* decision, and how he has implemented the requirements of *Apprendi, Blakely,* and *Booker* in his court. *United States v. Kandirakis,* 441 F. Supp. 2d 282 (D. Mass. 2006). Judge Young anticipated the Constitutional problems with the Federal Sentencing Guidelines, and ruled them unconstitutional prior to the Supreme Court's decision in *Blakely.* *Id.* (citing *United States v. Green,* 346 F. Supp. 2d 259 (D. Mass. 2004)). As a result, prior to the *Booker* decision, he implemented a

The fact that the remedial holding from *Booker* was not entirely predictable, however, does not diminish the significance of the dictated-by-prior-precedent Constitutional holding. The invalidation of sentences imposed under a mandatory application of the

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sentencing scheme that he referred to as "*Blakely*-izing" the Guidelines by requiring the government to prove to the jury beyond a reasonable doubt any sentencing enhancements that it would seek, a process that as he explained "reflected the preferred remedy of the dissenting Justices in Remedial *Booker*." *Id.* at 318-19.

Although, as Judge Young notes, "[t]he consequences of *Apprendi* for the Federal Sentencing Guidelines were immediately apparent," *id.* at 287, his opinion makes clear that these consequences primarily played out in *Booker*'s Constitutional holding. As for *Booker*'s remedial opinion, which Judge Young described learning of with the following humorous anecdote, he was left rather puzzled:

> I well remember the advent of *Booker*. We were trying a jury case. The law clerks, recognizing my continuing interest in these matters, e-mailed the decision to my courtroom deputy clerk, Elizabeth Smith, in the courtroom. She began printing out the decision. The courtroom printer is notoriously slow. As the first page came out of the printer, she slapped on a "Post-It" note and, grinning, passed it up to me. On the note was a little smiley face and the words "You'll love this!" Page by page, Justice Stevens's majority opinion was passed up to me until it was fully assembled.
>
> The printer kept on humming.
>
> Ms. Smith stopped passing the pages in order to scan for herself what turned out to be Remedial *Booker*. After three or four pages had printed out, she applied another "Post-It" and, crestfallen, passed them up. The second note read, "How can there be two different majority opinions in the same case?" How indeed?

Id. at 319.

guidelines is enough to justify retroactivity analysis on its own, aside from the predictability of the remedy that was chosen to fix the Constitutional violation. Further, while the remedy preferred by the dissenters from *Booker*'s remedial holding would appear to have had a more significant effect on the actual length of sentences, the remedial holding still carries profound implications regarding both the length of sentences and the methods by which they are imposed. The opinion's remedial holding might mathematically reduce the disparity between the duration of an unconstitutional sentence under the mandatory guidelines and that of an acceptable post-*Booker* sentence that treats the guidelines as advisory.[12] *See*

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[12] It also does not require profound statistical analysis to understand that the presumption of reasonableness afforded a within-guidelines sentence by the Courts of Appeals, including ours, has tended to diminish any meaningful difference in sentence length between pre-*Booker* sentences under the mandatory guidelines and post-*Booker* sentences. Douglas A. Berman, *Reasoning through Reasonableness,* 115 Yale L.J. Pocket Part 142, 143 (July/Aug.2006) ("Post-*Booker* circuit doctrines and practices encourage the sort of rote, mechanistic reliance on the Guidelines that Justice Stevens's merits opinion found constitutionally problematic."). When consulted, the statistics paint an even starker picture than an observer might have hypothesized. Essentially, the presumption of reasonableness has functioned to vitiate both holdings of *Booker* by placing non-subtle pressure on district courts to institute a within-guidelines sentence so as to avoid reversal. *See* Brief for New York Counsel of Defense Lawyers as Amicus Curiae, *Rita v. United States,* No. 06-5754 (U.S. Dec. 18, 2006) (surveying appellate decisions regarding sentencing appeals and concluding that of 1,152 within-guidelines sentences appealed by defendants, only 16 were reversed, while 60 of 71 below-guidelines sentences appealed by the government have been reversed, yet only 7 of 154

Booker, 543 U.S. at 302 (Stevens, J., dissenting in part) ("[T]he Court [in Remedial Booker] has effectively eliminated the very constitutional right *Apprendi* sought to vindicate."). The positions of the petitioners in the instant case illustrates, however, how a defendant sentenced under the post-*Booker* advisory guidelines regime still stands to serve a shorter sentence, rendering the question of *Booker*'s retroactive application something more than a purely academic exercise.

Each petitioner was sentenced under the pre-*Booker* mandatory Guidelines scheme. For each, therefore, the maximum sentence authorized by the facts established by the jury verdict was set by the range required by the Sentencing Guidelines.[13] *See, e.g., United States v. Blood,* 435 F.3d 612, 630 (6th Cir. 2006); *United States v. Oliver,* 397 F.3d 369, 378 (6th Cir. 2005) ("Given that the federal sentencing guidelines were mandatory at the time the district court sentenced Oliver, it seems clear now in light of *Booker* that the sentence imposed violated the Sixth Amendment."); *United States v. Davis,* 397 F.3d 340, 351 (6th Cir. 2005). It is undisputed that the 292 month sentences that both petitioners received were predicated on the district judge finding, based on a preponderance of the evidence, that 1.5 kilograms of

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above-guidelines sentences appealed by defendants have been reversed).

[13] This analysis would be different had they been sentenced under the post-*Booker,* advisory Guidelines regime, as the statutory maximum sentence for the crime of which they were convicted, not the Guidelines range, would set the ceiling. *See United States v. Duckro,* 466 F.3d 438, 443 (6th Cir. 2006).

crack cocaine could be attributed to each. The drug amount calculation made by the judge by a preponderance of the evidence resulted in each petitioner going from one extreme of the Guidelines based on the Drug Quantity Table of section 2D1.1 to the other extreme-that is to say they each received the highest possible base offense level based on a quantity of drugs alone of 38. Jimmy Ray Valentine also received a two-point offense level enhancement based on the district judge's determination that he played an aggravated leadership role in the drug conspiracy, resulting in a total offense level of 40.

Based on the jury verdict alone, which included no finding of an amount of drugs, the highest possible base offense level was 12. *See* U.S.S.G. § 2D1.1 (c). At this level, Jimmy Ray would have received a 10-16 month sentence (for his criminal history category of I), and Kenneth would have received a 15-21 month sentence (for his criminal history category of III). Instead, in stark contrast, they both received sentences of 292 months.[14] This equates to a twenty-four year, four month sentence for each-the difference of time each will spend in prison based on facts that were not found by a jury beyond a reasonable doubt is over twenty-two and a half years.

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[14] The judge's finding that Jimmy Ray had an aggravating role in the conspiracy and the resulting two point enhancement gave him an offense level of 40 with a criminal history category of I, which amounted to the functional equivalent of Kenneth's offense level of 38 with a criminal history of III. Each calculation led to a guideline range of 292-365 months, and the district judge gave both the minimum sentence allowed.

This is not to suggest that the petitioners have some claim to these specific shorter sentences, because were we to remand for resentencing under remedial *Booker,* the district court could certainly give a sentence within the same guideline range based on judge-found facts, so long as the guidelines range was applied in an advisory fashion. In Jimmy Ray's case, however, the district court would not be able to impose a sentence over 240 months at his hypothetical-resentencing, as that is the statutory maximum for his offense. *See Duckro,* 466 F.3d at 443 ("[I]n cases where sentencing occurred post-*Booker,* with the sentencing guidelines applying in only an advisory fashion, the maximum sentence authorized by the facts established through a guilty plea is the 'maximum sentence prescribed by the applicable statutory provision.'"). That is to say that Jimmy Ray would stand to have more than four years reduced from his sentence under *Booker* and *Apprendi.* Although Kenneth's sentence would not be similarly limited, as his prior drug conviction raises the statutory maximum to thirty years, the district court could have also, of course, chosen to sentence below the guidelines range of 292 months-a realistic possibility in light of its selection of the very bottom of the then-mandatory guidelines range. The upshot of the complicated effect of the guidelines is that both petitioners would have much to gain from a remand for resentencing under *Booker,* as they would stand to get sentences that were both shorter and Constitutional. Not only did their sentences violate *Booker,* but they violated the principle of *Apprendi* that any fact "necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must

be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Of perhaps greater importance than any numerical disparities in the lengths of sentences, however, is the less concrete but more profound value of imposing criminal sentences **only after** ensuring that vital, centuries-old Constitutional guarantees have been met:

> "What is overlooked in post-*Booker* discussions is the fact that, for seventeen years, federal courts had been sentencing offenders unconstitutionally." (quoting Professor Douglas Berman, Remarks at Harvard Black Letter Law Association (Apr. 4, 2006)). For seventeen years federal courts had been sentencing offenders unconstitutionally. Think about that. The human cost is incalculable—thousands of Americans languish in prison under sentences that today are unconstitutional. The institutional costs are equally enormous—for seventeen years the American jury was disparaged and disregarded in derogation of its constitutional function; a generation of federal trial judges has lost track of certain core values of an independent judiciary because they have been brought up in a sentencing system that strips the words "burden of proof," "evidence," and "facts" of genuine meaning; and the vulnerability of our fair and impartial federal trial court system to attack from the political branches of our government has been exposed as never before in our history.

Kandirakis, 441 F. Supp. 2d at 283. Stated somewhat differently, the *Apprendi* line of cases means much more than how long the government can send a defendant to jail-it speaks volumes about how we, as a

democratic society, are able to follow the strictures that represent the very backbone of our legal and Constitutional system. *See, e.g., Apprendi,* 530 U.S. at 466 (""To guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....'") (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873) and 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). *Apprendi* and its offspring—*Blakely* and *Booker*—recognize a critical, constitutionally mandated check on the sentencing process, through the grounding of sentencing determinations in facts that have been proved to the jury beyond a reasonable doubt. Our modern federal judiciary has been reluctant to recognize this Sixth Amendment limitation,[15] probably due to the primacy of the mandatory sentencing guidelines that has been ingrained in our approach to sentencing for seventeen years. Although this is an innate and natural way for anyone to think, federal judges included, our personal experience over seventeen years clearly must take a backseat to the fundamental guarantees of the centuries-old Bill of Rights, with the benefit of the

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[15] *See, e.g., Koch,* 383 F.3d at 438 ("[W]e conclude that *Blakely* does not require us to invalidate the Guidelines.").

Supreme Court's reinvigoration of these values through *Apprendi* and its progeny (i.e. *Booker*).

IV.

Because I do not believe *Booker* to be a new rule but rather to be a straightforward application of *Apprendi*, federal habeas petitioners whose convictions became final after *Apprendi* should be able to benefit from *Booker*. For this reason, I respectfully dissent from the majority opinion with respect to Part II. B.

UNITED STATES OF AMERICA,
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

- - - - - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIMMY RAY VALENTINE,
KENNETH JEROME VALENTINE,
CHARLES EDWARD BENNETT,
COREY TIWANE VALENTINE,
DEDRICK QUWANTA VALENTINE,
JOHNNY VALENTINE,
ROBERT DONTRALL SHARP,
and
KENYA LEVELLE VALENTINE,

Defendants.

Case No. 1:99-CR-01

Hon. Richard Alan Enslen,
Chief Judge

VERDICT FORM AND SPECIAL INTERROGATORIES

1. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury,

unanimously find defendant JIMMY RAY VALENTINE

_____Not Guilty

×____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that **JIMMY RAY VALENTINE** has conspired to possess with intent to distribute the following drugs:

×____ Cocaine

×____ Cocaine Base (Crack Cocaine)

_____ Marijuana

2. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant KENNETH JEROME VALENTINE

_____Not Guilty

×____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that KENNETH JEROME VALENTINE has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

×____ Cocaine Base (Crack Cocaine)

_____ Marijuana

3. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine,

and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant CHARLES EDWARD BENNETT

_____Not Guilty

_____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that CHARLES EDWARD BENNETT has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

_____ Cocaine Base (Crack Cocaine)

_____ Marijuana

4. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant COREY TIWANE VALENTINE

_____Not Guilty

×____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that COREY TIWANE VALENTINE has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

×____ Cocaine Base (Crack Cocaine)

×____ Marijuana

5. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant DEDRICK QUWANTA VALENTINE

×_____Not Guilty

_____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that DEDRICK QUWANTA VALENTINE has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

_____ Cocaine Base (Crack Cocaine)

_____ Marijuana

6. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant JOHNNY VALENTINE

_____Not Guilty

×_____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that JOHNNY VALENTINE has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

×_____ Cocaine Base (Crack Cocaine)

×_____ Marijuana

7. As to Count One of the Indictment, charging a conspiracy to possess with intent to distribute cocaine, and/or cocaine base, and/or marijuana we, the jury, unanimously find defendant ROBERT DONTRALL SHARP

×____Not Guilty

_____Guilty

A. (Only complete this interrogatory if you find the defendant guilty as to Count One.) We, the jury, unanimously agree that ROBERT DONTRALL SHARP has conspired to possess with intent to distribute the following drugs:

_____ Cocaine

_____ Cocaine Base (Crack Cocaine)

_____ Marijuana

8. As to Count Two of the Indictment, charging distribution of cocaine base, we, the jury, unanimously find defendant DEDRICK QUWANTA VALENTINE

_____Not Guilty

×____Guilty

So, Say We All, this 11 day of February, 2000.

_____

JURY FOREPERSON

_____ _____

_____ _____

_____ _____

_____

UNITED STATES DISTRICT COURT

Western District of Michigan

UNITED STATES OF AMERICA	**Judgment in a Criminal Case (for Offenses Committed On or After November 1, 1987)**
v.	Case Number 1:99-CR-1-02
JIMMY RAY VALENTINE	Michael T. Maddaloni Defendant's Attorney

THE DEFENDANT was found guilty on Count One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Date Offense Concluded	Count Number(s)
21:846 and 841(a)(1)	January 12, 1999	One

Nature of Offense

Conspiracy to Distribute and Possess With Intent to Distribute Cocaine, Cocaine Base, and Marijuana

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or

mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence: May 18, 2000

Defendant's Soc. Sec. No.: ***-**-****
Defendant's Date of Birth: June 7, 1963
US Marshal's No.: 09555-040

Defendant's Address: 1980 Hatch
Benton Harbor, MI 49022

DATED: 5-24-2000

HON. RICHARD ALAN ENSLEN
CHIEF JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED NINETY -TWO (292) MONTHS.**

It is recommended that the defendant participate in the Inmate Financial Responsibility Program to provide for his dependent children. The defendant shall not be deprived of prison employment or UNICOR employment or educational opportunities because the defendant is paying child support in lieu of paying the fine and other financial obligations.

Friend of the Court **Docket No.: 99-82106-DP-M**
2nd Circuit Court
811 Port Street
St. Joseph, MI 49085

RETURN

I have executed this judgment as follows:

_____

_____

_____ Defendant delivered on _____

to _____

_____, with a certified copy of this judgment.

_____

United States Marshal

By_____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS.**

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation department in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions of supervision, and shall comply with the following additional conditions:

The defendant shall not illegally possess a controlled substance and shall refrain from the unlawful use of controlled substances.

The defendant shall not possess a firearm, destructive device or other dangerous weapon.

The defendant shall submit to one drug test within fifteen (15) days of release on supervised release and

at least two periodic drug tests thereafter within sixty (60) days or as otherwise directed by the Court.

The defendant shall pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall notify the Probation Officer at least fifteen (15) days prior to any change in residence in accordance with the Violent Crime Control and Law Enforcement Act of 1994.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her

dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 15 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any

agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following criminal monetary penalties in accordance with the schedule of payments set forth below.

	Assessment	Fine	Restitution
Totals:	$100.00	$5,000.00	$0.00

SPECIAL ASSESSMENT

The defendant shall pay to the United States a special assessment of $100.00.

CHILD SUPPORT OBLIGATION

Prior to the payment of the fine, the defendant shall pay past due child support, as well as any other child support obligations due or accruing while the defendant is incarcerated or is on supervised release.

After payment of the special assessment, the obligation to pay child support shall take precedence to all other financial obligations imposed by this judgment, and should the defendant participate in the Inmate Financial Responsibility Program, the defendant's child support obligations shall be paid

prior to the payment of other obligations which are part of that Program.

The defendant shall not be deprived of prison employment or UNICOR employment or educational opportunities because the defendant is paying child support in lieu of paying the fine and other financial obligations.

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St. Joseph, MI 49085

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $5,000.00.

FORFEITURE

The defendant shall forfeit to the United States of America the defendant's interest in United States Currency as set forth in this Court's May 17, 2000 Final Order of Forfeiture.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:
(1) assessment; (2) child support obligation;
(3) restitution; (4) fine principal; (5) cost of prosecution;
(6) interest; (7) penalties.

Payment of the criminal monetary penalties shall be due in full immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of the criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments

are to be made as directed by the court, the probation officer or the United States attorney.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: I

Imprisonment Range: 292 to 365

Supervised Release Range: at least 5 years

Fine Range: $25,000.00 to $4,000,000.00 - Fine is waived because of the defendant's inability to pay.

Restitution: not applicable

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed at the lowest end of the guideline range because, in this Court's opinion, the guideline's call for much too severe a punishment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 00-1590, 00-1603, 00-1604, 00-1615, 00-1651, 00-1958

UNITED STATES of America,

Plaintiff-Appellee,

v.

Johnny VALENTINE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Michigan

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Before BOGGS, SUHRHEINRICH and CLAY, Circuit Judges.

BOGGS, Circuit Judge. Appellants Johnny Valentine, Corey Valentine, Dedrick Valentine, Jimmy Ray Valentine, Kenneth Valentine, and Charles Bennett appeal numerous aspects of their

convictions and sentences.[1] The convictions in this case arose from the prosecution of a drug distribution organization based in Benton Harbor, Michigan. The initial trial of the defendants lasted fourteen days. We affirm on each issue in all of the appeals.

I

Johnny Valentine

Johnny Valentine was convicted of one count of conspiracy to distribute and to possess with intent to distribute cocaine base (crack) and marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). According to the government, Johnny was responsible for purchasing large quantities of crack from Arkansas for sale in Michigan. He operated several crack houses in Benton Harbor. At his sentencing, the district court found that he was responsible for at least 1.5 kilograms of crack, which resulted in the court assigning him a base offense level of 38. The district court added two levels, pursuant to U.S.S.G. § 2D1.1(b)(1), for possession of a dangerous weapon during criminal activity. His criminal history category was determined to be I. He was sentenced to the lowest end of the guideline range, 292 months of imprisonment.

Corey Valentine[2]

Corey Valentine was convicted of one count of conspiracy to distribute and to possess with intent to

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[1] Due to the multiplicity of defendants with the same last name, the Valentines will often be referred to by their first names.

[2] Corey Valentine was granted permission to adopt the briefs of his co-defendants.

distribute crack and marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). According to the government, Corey was a key member of the Valentine organization, responsible for transporting crack from Arkansas to Michigan. At his sentencing he was found responsible for 1.5 kilograms of crack, which resulted in the district court assigning him a base offense level of 38. The court determined that he had a criminal history category of I. While the defense argued that the district court should decrease Corey's base offense level by two levels because he was a minor participant in the criminal activity, the district court declined to do so. He was sentenced to the lowest end of the guideline range, 235 months of imprisonment.

Dedrick Valentine[3]

Dedrick Valentine was convicted of knowingly and intentionally distributing a quantity of crack, in violation of 21 U.S.C. § 841(a)(1). He was acquitted of the conspiracy to distribute and possess with intent to distribute charge.

His pre-sentence report characterizes him as a low-level distributor of crack. At his sentencing, he was found responsible for 283.5 grams of crack, which resulted in a base offense level of 34. The district court reduced his base offense level by two levels because it found that Dedrick was a minor participant, pursuant to U.S.S.G. § 3B1.2(b), and declined to grant his motion for a downward departure. He was found to have a criminal history category of IV. The court

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[3] Dedrick Valentine was granted permission to adopt the briefs of his co-defendants.

sentenced him to the lowest end of the guideline range, 168 months of imprisonment.

Jimmy Ray Valentine

Jimmy Ray Valentine was convicted of one count of conspiracy to distribute and to possess with intent to distribute cocaine and crack, in violation of 21 U.S.C. §§ 846 and 841(a)(1). According to the government, Jimmy Ray would obtain drugs from his convicted co-conspirator, Jerry Butler, in Arkansas, as well as other drug suppliers in California, Texas, and other locations, for distribution to drug dealers in southwest Michigan. At his sentencing hearing, the district court determined that he was responsible for over 1.5 kilograms of crack, which resulted in a base offense level of 38. The district court increased his base offense level by two levels, pursuant to U.S.S.G. § 3B1.1(c), finding that he was an organizer or a leader of the conspiracy. The district court also declined to grant a motion for a downward departure. Jimmy Ray's criminal history category was determined to be I. The court sentenced him to the lowest end of the guideline range, 292 months of imprisonment.

Kenneth Valentine

Kenneth Valentine was convicted of one count of conspiracy to distribute and to possess with intent to distribute crack, in violation of 21 U.S.C. §§ 846 and 841(a)(1). According to his presentence investigation report, he was responsible for arranging for the purchase of crack in Arkansas and for paying the couriers used to pick up the crack in Arkansas. At his sentencing hearing, the district court determined that he was responsible for over 1.5 kilograms of crack. resulting in a base offense level of 38. The district

court declined to grant a motion for a downward departure. Kenneth's criminal history category was determined to be III. The court sentenced him to the lowest end of the guideline range, 292 months of imprisonment.

Charles Bennett

Charles Bennett was convicted after his second trial of one count of conspiracy to distribute and to possess with intent to distribute cocaine, crack, and marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). His first trial ended in a mistrial after the jury deadlocked.

During Bennett's first trial, after the jury retired to deliberate, a juror was replaced by an alternate juror after she requested to be relieved due to a family emergency. Prior to replacing the juror, the court asked Bennett and his counsel to approve the change in the jury's composition, and they consented. After the jury was brought in with the new juror, the government asked for a waiver of objection to the replacement of the juror by Bennett. Bennett again consented to the replacement. After the jury began to deliberate again, Bennett requested that the court declare a mistrial due to the substitution of the alternate juror. The district court denied the motion. After supplemental instructions by the court (to which Bennett did not object), the jury deadlocked and a mistrial was ordered with respect to Bennett.

At his sentencing hearing following the second trial, the district court determined that Bennett was responsible for 1.5 kilograms of crack, which Bennett's

counsel states resulted in a base offense level of 40.[4] It was determined that Bennett's criminal history category was I. Prior to his sentencing hearing, Bennett objected to any sentence of more than 240 months because the indictment did not specify any amount of controlled substances, citing *Apprendi v. New Jersey,* 530 U.S. 466 (2000). At the sentencing hearing, Bennett moved for a downward departure because of his ailing health. The district court sustained the *Apprendi* objection and determined that Bennett's maximum lawful sentence was 240 months. The district court also departed downward and sentenced Bennett to 180 months of imprisonment.

II. The Indictments

Appellants Jimmy Ray Valentine, Johnny Valentine, Charles Bennett, Dedrick Valentine, and Corey Valentine argue that the district court lacked jurisdiction to enter a conviction and impose a sentence because the indictment failed to list certain "essential elements" of the charged offense, specifically the quantity of drugs, and for which type

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[4] Bennett's counsel wrote an *Anders* brief on appeal, which notifies the court that counsel requests permission to withdraw from the appeal because of a lack of any good-faith issues to appeal, and identifies issues that arguably might be appealed. *Anders v. California,* 386 U.S. 738. Bennett submitted a *pro se* response to the *Anders* brief in which he raised issues he believed worthy of appeal. Neither Bennett nor the government submitted any of Bennett's documents from the district court for inclusion in the Joint Appendix. The government did not submit any argument countering Bennett's *pro se* appeal. As such, all facts pertaining to Bennett included in this opinion are taken from the *Anders* brief submitted by Bennett's counsel.

of drug they were to be held accountable. This argument has become unavailing since appellants filed their briefs. The Supreme Court held in *United States v. Cotton* that a defective indictment does not deprive a court of jurisdiction, in the sense of the authority to adjudicate a case. 535 U.S. 625, 631 (2002).

Jimmy Ray, Johnny, Dedrick, and Corey Valentine also argue that the indictment violated their Fifth and Sixth Amendment rights to confront the evidence against them, and that the judge's failure to instruct the jury that it must find a specific amount of drugs attributable to the conspiracy amounted to a "constructive amendment" to the indictment.[5] They argue that they were not afforded notice of the charges against them as they were told at their arraignments that the offense with which they were charged, § 841(b)(1)(A), carried a penalty of ten years to life. However, when the jury was instructed that quantity was not an element of the offense, it was being instructed pursuant to § 841(b)(1)(c), which carries a maximum penalty of twenty years of imprisonment. They argue that they may have been more likely to plead guilty, and would have had more leverage to do so, had they known their conviction would result in only a twenty-year maximum.

The Supreme Court in *Cotton* rejected similar arguments. The defendant in *Cotton* did not object in the district court to the fact that the sentences were based on a quantity not alleged in the indictment;

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[5] Any aspects of this second argument that deal with sentencing issues will be addressed at part IV.E, *infra*.

therefore the Court applied a plain error analysis, pursuant to Federal Rule of Criminal Procedure 52(b). *Cotton,* 535 U.S. at 631-32. The Court concluded that there was plain error, but that even if the error affected the substantial rights of the defendant, it did not seriously affect the fairness, integrity or public reputation of the judicial proceedings, because the evidence was overwhelming and uncontroverted that the conspiracy involved at least 50 grams of cocaine base. *Id.* at 623-33. The evidence in this case is likewise overwhelming and essentially unrefuted that the participants in this conspiracy were responsible for at least 1.5 kilograms of crack.

As for appellants' arguments regarding their lack of notice, and the possibility that they might have handled their plea negotiations differently, it is as likely that they may have gone to trial knowing they were only risking twenty years in prison instead of a maximum of a life sentence. Moreover, had they pushed the issue in the district court, the court might have acquiesced and given the jury a quantity instruction.

III. The Trial

A. Sufficiency of the evidence to support appellants' convictions

Appellants Dedrick, Jimmy Ray, Johnny, and Corey Valentine all argue that the evidence presented at trial was not sufficient to support their convictions. This court reviews a defendant's sufficiency of the evidence claim by considering "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307,

319 (1979). However, none of the appellants moved for judgment of acquittal at the close of the government's case-in-chief pursuant to Federal Rule of Criminal Procedure Rule 29. This court has held that failing to make this motion "constitutes a waiver of any objection to the sufficiency of the evidence." *United States v. Nesbitt,* 90 F.3d 164, 167 (6th Cir. 1996). Therefore, we may only disturb the jury's verdict if it constitutes a miscarriage of justice. *United States v. Charles,* 138 F.3d 257, 265 (6th Cir. 1998).

1. **Dedrick Valentine**

In order to establish the crime of distribution of cocaine base, the government must prove that the defendant: (1) knowingly or intentionally distributed cocaine base, and; (2) at the time of such distribution knew that the substance was cocaine base. 21 U.S.C. § 841(a); *United States v. Colon,* 268 F.3d 367, 376 (6th Cir. 2001).

The main thrust of Dedrick's argument is that the witnesses who testified against him were not credible because they were cooperating witnesses. He argues that because the jury found him not guilty of the conspiracy charge, and because these witnesses were testifying against him as to his participation in the conspiracy, the jury must have discounted their testimony. He also takes issue with the testimony of Melvin Ferguson and Detective John Briney, who both testified regarding a "controlled buy" involving Dedrick.

Ferguson, at the behest of law enforcement, contacted Dedrick in order to make a purchase of crack. Law enforcement taped the telephone conversation between Dedrick and Ferguson, in which

Dedrick agreed to sell a quarter-ounce of crack to Ferguson and agreed to meet Ferguson at a specific place designated by Dedrick. This tape was played for the jury. Detective Briney testified that he observed Ferguson drive to the meeting place, observed Dedrick approach the car and speak with Ferguson, observed him walk away from the car and disappear from view behind a house, and then return within less than two minutes and meet again with Ferguson. Ferguson drove away and was met by law enforcement. Ferguson had previously been searched in order to verify that he had no drugs on his person. He turned over the cocaine base he had just purchased from Dedrick. Ferguson also testified at trial that he had purchased one-half to one ounce quantities of crack from Dedrick on at least twelve occasions.

Dedrick argues that Detective Briney's testimony should be discounted because he was too far away to observe the transaction, and later admitted that he did not observe the transaction take place. He also argues that Ferguson should not be believed.

Credibility determinations are within the sole province of the jury, and this court grants special deference to the resolution of credibility questions by the jury. *United States v. Latouf,* 132 F.3d 320, 330-31 (6th Cir. 1997). Dedrick's counsel had ample opportunity at trial to attack the credibility of all the witnesses against him. As to Detective Briney's testimony, we have held that "circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Peters,* 15 F.3d 540, 544 (6th Cir. 1994) (internal quotation marks and citations omitted). There was no

manifest miscarriage of justice in Dedrick's conviction.

2. Jimmy Ray, Johnny, and Corey Valentine

Jimmy Ray, Johnny, and Corey Valentine were convicted of conspiracy to distribute and possess with intent to distribute cocaine base. In order to meet its burden of proof, the government must show: (1) the existence of an agreement to violate the drug laws; and (2) that the defendant knew of, intended to join, and participated in the conspiracy. *United States v. Ferguson,* 23 F.3d 135, 140 (6th Cir. 1994).

Appellants argue that the witnesses who testified against them were not credible because they were all hoping for reduced sentences in exchange for their cooperation. They also argue that their testimony was impermissibly vague and unreliable because it did not refer to exact amounts or specific dates of transactions.

First, defense counsel had ample opportunity to cross-examine the witnesses who testified against the appellants. Moreover, the judge instructed the jury as to how it should weigh the credibility of the witnesses, and specifically mentioned that it should consider any relationship the witness had with the government, and any reason the witness might have to lie. Credibility determinations are within the sole province of the jury, and this court grants special deference to the resolution of credibility questions by the jury. *Latouf,* 132 F.3d at 330-31.

A review of the evidence presented at trial reveals that there was sufficient evidence to convict appellants. Numerous witnesses testified to

conducting crack business with appellants, including principal suppliers to the conspiracy, Jerry Lee Butler and Abdul Moore, and high-level distributors for the conspiracy, Yusef Phillips, Lubert Brock, and Myron Bennett. These witnesses testified that Jimmy Ray operated a drug distribution organization, assisted by members of his extended family and friends. Jimmy Ray would arrange for the purchase of crack from Arkansas, Corey made numerous trips to Arkansas to transport the crack back to Michigan, and Johnny was primarily responsible for its distribution in Michigan. There was no manifest miscarriage of justice in the convictions of Jimmy Ray, Johnny, and Corey Valentine.

B. Government's Motion in limine

Kenneth, Dedrick, and Corey Valentine argue that the district court's failure to allow them to impeach Jerry Lee Butler and Yusef Phillips warrants reversal. The government moved in limine for an order preventing the defendants from recalling to the stand Sergeant Roger Lange, citing Rule 613(b) of the Federal Rules of Evidence. The defendants wished to call Sergeant Lange in an effort to impeach Butler and Phillips, two government witnesses. The motion was granted by the district court on the grounds that it was only proper to "cross-examine a witness whose [sic] taken a statement . . . if the witness [has] adopted the statement." A trial court's decision to exclude evidence pursuant to a motion in limine is reviewed for an abuse of discretion. *United States v. Phibbs,* 999 F.2d 1053, 1078 (6th Cir. 1993). Appellants assert that they had intended to call Lange in order to impeach Butler and Phillips with the previous statements Butler and Phillips had made by asking

Lange to state what they had told him upon first being arrested. It appears that the intent of the defense was to show that both Butler and Phillips had been more forthcoming with inculpatory statements about the defendants as it became clear they would be offered a deal by the government. Appellants further assert that they had no intention of introducing Lange's written report of the conversations, but only intended to use it to refresh Lange's recollection about the conversations.

The government argues that first, appellants never identified any inconsistent statements and were attempting to impeach the witnesses' present testimony with prior silence. Moreover, the government argues that neither Butler nor Phillips adopted Lange's report as a prior statement.

Federal Rule of Evidence 613(b) governs the use of prior statements of witnesses. It states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Fed.R.Evid. 613(b). The district court was correct in concluding that it would be improper to impeach either Butler or Phillips with a third-party's rendition of his statements without Butler or Phillips adopting the statement as his own. *United States v. Saget,* 991 F.2d 702, 710 (11th Cir.), *cert. denied,* 510 U.S. 950 (1993). However, the attempt to question Lange regarding prior inconsistent statements made by Butler and Phillips was proper, provided the defense could identify any actual inconsistent statements. A

statement used to impeach a witness must be in fact inconsistent with the witness's statements made at trial, and the court must be persuaded that this is so. *United States v. Hale,* 422 U.S. 171, 176 (1975).

Defense counsel argued to the district court that he would ask Lange "did he mention [the defendant]," and Lange would say "no, I don't believe he did." Counsel further argued that the police report would only be used to refresh Lange's recollection. Counsel did not identify any statements that were even arguably inconsistent with the witnesses' testimony. Moreover, it appears from appellants' brief that counsel would have attempted to introduce Lange's testimony as to the witnesses' silence at the initial questioning and the additional information they offered as a deal became available in order to discredit the trial testimony Butler and Phillips gave. However discrediting Lange's testimony may have been, Lange would not have been testifying as to prior inconsistent statements. The district court did not abuse its discretion in excluding Lange's testimony regarding his initial conversations with Butler and Phillips.

C. Statements by the Trial Court

Kenneth, Dedrick, and Corey Valentine argue that the district court violated Federal Rule of Evidence 605, the Confrontation Clause, and the Due Process Clause when it made statements to the jury during the trial regarding the provisions of Jerry Butler's plea agreement and the sentencing guideline range applicable to him. Butler, one of the prosecution's main witnesses, had been questioned extensively throughout his testimony by both the prosecution and the defense regarding the terms of his plea agreement, what he understood of the sentencing guidelines, and

the possible sentence he might expect in return for his cooperation with the government. The government in its brief characterizes Butler as "functionally illiterate" and contends that he had difficulty articulating answers to these questions.

After Butler's testimony, the court stated to the jury: "You should consider the testimony of Mr. Butler and others with more caution than the testimony of other witnesses and you must consider whether or not the testimony was influenced by the Government's promises." The court went on to go through Butler's plea agreement with the jury. The court also explained to the jury what the sentencing guidelines are and how they would be applied to Butler. At the end of the explanation, the court stated: "What sentence will he get next week? I don't know. Will it be influenced by his testimony here? I don't know. It doesn't sound like any agreement it will. That's all I can say about it. Okay."

On the day Butler was to be sentenced, the court announced to the jury that it was sentencing Butler. The court stated: "I now have a presentence report and I know how the probation officer scored him. And he scored him so that his minimum sentence would be 292 months or 24.4 years at the minimum. At the maximum, 365 months, which is, of course, 30 years." Butler was eventually sentenced to 210 months of imprisonment.

Appellants urge that the proper standard of review for evaluating claims of improper judicial conduct is *de novo,* as it is a mixed question of law and fact. They argue that no objection is necessary to preserve the error, citing Federal Rule of Evidence 605 ("The judge presiding at the trial may not testify in that trial as a

witness. No objection need be made in order to preserve the point."). The government argues that without preservation by objection, the claim is reviewed for plain error, citing *United States v. Owens,* 159 F.3d 221, 227 (6th Cir. 1998).

Because Rule 605 states that no objection is necessary to preserve a claim for its violation, the proper standard of review is *de novo. See United States v. Paiva,* 892 F.2d 148, 158 n. 8 (1st Cir. 1989); *Cohen v. United States,* No. 02-4443, 2002 WL 31856828, at *1 (4th Cir. Dec. 23, 2002) (per curiam) (unpublished disposition).

Rule 605 contemplates situations in which a presiding judge is called to testify in the trial over which he is presiding. Fed.R.Evid. 605 advisory committee's note. The rule "is a broad rule of incompetency." *Ibid.* The appellants' claim should be addressed under federal caselaw that governs a district court judge's power of comment and the limitations on this power. *See, e.g., Quercia v. United States,* 289 U.S. 466 (1933).

In *Quercia,* the Supreme Court reversed a conviction based upon the judge's charge to the jury in which he expressed his opinion, referring to the defendant, that "every single word that man said, except when he agreed with the Government's testimony, was a lie." *Id.* at 468, 472. The Court explained that a judge may help the jury by "explaining and commenting upon the evidence." *Id.* at 469. However, "[i]n commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it." *Id.* at 470.

The district court judge committed error by adding to the testimony presented at trial when he discussed the details of Butler's presentence report. Butler's plea agreement had already been entered into evidence, and the judge was merely commenting on it and explaining it to the jury. Nevertheless, Butler's presentence report was not entered into evidence. By discussing its details, the judge was adding to the evidence presented at trial. However, we conclude that the judge's error was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 22-24 (1967). The judge's error did not deny appellants a fair trial. Moreover, the judge stated to the jury just before it entered into deliberations that "[n]othing I have said or done during this trial was meant to influence your decision. You decide for yourselves whether the Government has proven the defendants guilty beyond a reasonable doubt." The judge's error does not require reversal.

IV. Sentencing

A. Sentencing for crack rather than marijuana

Charles Bennett, Dedrick Valentine, and Corey Valentine argue that the district court committed plain error when it sentenced them under 21 U.S.C. § 841(b)(1)(C) rather than § 841(b)(1)(D) because the jury returned a general verdict.

This argument is without merit. The record clearly shows that the verdict forms contained special interrogatories. In the case of Charles Bennett, the jury checked "Guilty," and then checked "Cocaine Base (Crack Cocaine)" in response to the statement: "We, the jury, unanimously agree that CHARLES EDWARD BENNETT has conspired to distribute and possess with intent to distribute the following

drugs:...." District court docket R. 301. In the case of Corey Valentine, the jury checked "Guilty," and then checked "Cocaine Base (Crack Cocaine)" and "Marijuana" in response to the same statement. District court docket R. 247. In the case of Dedrick Valentine, in response to the statement "As to Count Two of the Indictment, charging distribution of cocaine base, we, the jury, unanimously find defendant DEDRICK QUWANTA VALENTINE...." the jury checked "Guilty." *Ibid.* The district court did not commit any error when it sentenced appellants under 21 U.S.C. § 841(b)(1)(C).

B. Downward Departures

1. Dedrick Valentine

At his sentencing hearing, Dedrick made a motion for a downward departure based on the disproportionate impact of including acquitted conduct in the computation of his sentence. A decision not to depart downward from the sentencing guidelines is not reviewable on appeal, unless the district court was not aware of its authority to depart. *United States v. Butler,* 207 F.3d 839, 843 (6th Cir. 2000).

The transcript from the sentencing hearing indicates that the district court was well aware of its discretion to depart downward on this basis, but chose not to. The district court concluded that "because Defendant's base offense level only includes relevant conduct in which he was personally engaged and does not include the conduct of co-defendants, which arguably could be attributed to him, the Court cannot conclude this case falls outside the heartland." The district court's discussion of "the heartland" expresses its awareness of its discretion to depart downward.

The district court's decision not to depart downward is not reviewable by this court.

2. Corey Valentine

Corey argues that his base offense level should have been reduced by two levels because he was a minor participant in the offense. A district court's determination that a defendant did not play a minor role in the offense is reviewed for clear error. *United States v. Maliszewski,* 161 F.3d 992, 1022 (6th Cir. 1998). U.S.S.G. § 3B1.2 provides that a district court should decrease a defendant's base offense level by two levels "[i]f the defendant was a minor participant in any criminal activity." U.S.S.G. § 3B1.2(b). The defendant bears the burden of proving by a preponderance of the evidence the mitigating factors that justify a reduction. *Latouf,* 132 F.3d at 332. In order to prevail, the defendant must show that he was "substantially less culpable than the average participant" in the criminal enterprise. *United States v. Miller,* 56 F.3d 719, 720 (6th Cir. 1995) (citations and quotation marks omitted).

Defense counsel argued at sentencing that Corey was a minor participant because he was not as "greatly involved as the other members of th[e] conspiracy," and cited Butler's statements about Corey, which essentially asserted that Corey just carried the drugs and didn't have much to do with the conspiracy. The district court, citing other testimony adduced at trial, concluded that while Corey may have been "less culpable than others in the conspiracy, [his] conduct indicates he was an average conspirator at the very least," and overruled the objection.

Corey did not present any persuasive argument or evidence at sentencing that would indicate he was

"substantially less culpable than the average participant" in the conspiracy. The court carefully considered his role and compared it to the role of all of the other co-conspirators. The district court did not commit any error in denying Corey's motion for a downward departure pursuant to U.S.S.G. § 3B1.2.

3. Kenneth Valentine

Kenneth argued at the sentencing hearing that the 100 to 1 sentencing ratio between crack and powder cocaine merited a downward departure because the disparity violates the United States Constitution.[6] The district court refused to grant the downward departure, stating that the Sixth Circuit has rejected every constitutional challenge to the disparity, citing *United States v. Gaines,* 122 F.3d 324 (6th Cir. 1997), *United States v. Smith,* 73 F.3d 1414 (6th Cir. 1996), and *United States v. Lloyd,* 10 F.3d 1197 (6th Cir. 1993).

Kenneth argues that the sentencing disparity violates both the separation of powers doctrine and the Equal Protection Clause. This court has already rejected the equal protection challenge to the sentencing scheme in *Lloyd,* 10 F.3d at 1220. This court has not addressed a separation of powers challenge to the sentencing disparity.

Kenneth argues that President Clinton's failure to nominate voting members to the United States Sentencing Commission rendered the Commission

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[6] The Sentencing Guidelines treat 1 gram of crack cocaine as equivalent to 100 grams of powder cocaine for sentencing purposes.

useless as four members are required to promulgate a proposed guideline. On November 15, 1999, seven voting members were appointed. A bill was passed by Congress and signed by President Clinton on October 31, 1995 that required the Commission to study and make recommendations concerning the 100 to 1 ratio. The Commission recommendation of a 5 to 1 ratio was proposed in April 1997. Soon after, the Commission lost all of its voting members. After October 31, 1998, only two nonvoting members remained on the Commission. On September 26, 2000, three months after Kenneth Valentine was sentenced, the Commission was able to begin considering limited matters.

Kenneth claims that the Executive effectively disabled the Commission (part of the judiciary) by failing to appoint members. He argues that this failure was essentially an "Executive Veto," similar to the "Legislative Veto" proscribed in *INS v. Chadha,* 462 U.S. 919 (1983). He argues the President prevented the judiciary from accomplishing its function, and thus violated the separation of powers doctrine.

Although this court has not addressed a separation of powers challenge to the 100 to 1 sentencing ratio, whatever the reasons that the disparity exists, it is not a permissible basis for a downward departure. *Gaines,* 122 F.3d at 331. The district court did not abuse its discretion in refusing to depart downward as it did not have the authority to do so on this basis.

C. Sentencing Enhancements

1. Johnny Valentine

Johnny objected at his sentencing hearing to the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon during criminal activity recommended in the presentence report. He argues on appeal that the district court erred in overruling that objection because it did not apply the proper standard to determine whether he had used a dangerous weapon. He argues that the district court should have followed the holding in *Bailey v. United States,* 516 U.S. 137 (1995), which established the standard for enhancing a sentence pursuant to 18 U.S.C. § 924(c) for carrying or using a firearm in connection with a drug conspiracy.

A district court's determination that a defendant possessed a firearm during a drug crime is a factual finding, subject to the "clearly erroneous" standard of review. *United States v. Elder,* 90 F.3d 1110, 1133 (6th Cir.), *cert. denied,* 519 U.S. 1016 (1996). The Sentencing Guidelines provide that "if a dangerous weapon (including a firearm) was possessed, increase [the base offense level] by 2 levels." U.S.S.G. § 2D1.1(b)(1). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). The district court must first determine whether the defendant possessed a firearm during the crime. If so, the burden shifts to the defendant to show that it was clearly improbable that the weapon was connected with the offense. *United States v. Cochran,* 14 F.3d 1128, 1132 (6th Cir. 1994). "[P]ossession of a gun by one coconspirator is

attributable to another coconspirator if such possession constitutes reasonably foreseeable conduct." *Ibid.* (quoting *United States v. Chalkias,* 971 F.2d 1206, 1217 (6th Cir.), *cert. denied,* 506 U.S. 926 (1992)).

In arguing that the district court applied the wrong legal standard by not following the standard established in *Bailey,* the appellant confuses the guideline standards with the substantive law under 18 U.S.C. § 924(c). The Supreme Court in *Bailey* specifically limited its holding to convictions under 18 U.S.C. § 924(c)(1), and indicated that its holding did not apply to guideline enhancements for weapons possession. *Bailey,* 516 U.S. at 150.

The district court did not err when it applied the sentencing enhancement. At trial, witnesses testified that Johnny and two co-conspirators drove to Grand Rapids, Michigan in order to rob their drug supplier of crack at gun point. Although Johnny stayed in the car during the robbery, he was aware that a gun was to be used, as the three men had discussed the matter beforehand. After the robbery, they drove back and divided up the stolen crack. Appellant argues that he never physically possessed the firearm, and thus the sentencing enhancement should not apply. Yet, if the offense committed by a defendant is part of a conspiracy, it is sufficient if the government establishes "that a member of the conspiracy possessed the firearm and that the member's possession was reasonably foreseeable by other members in the conspiracy." *United States v. Owusu,* 199 F.3d 329, 347 (6th Cir. 2000); *Cochran,* 14 F.3d at 1132. Johnny knew his co-conspirator possessed a

weapon; thus the district court did not err in finding that Johnny possessed a weapon.

Johnny Valentine did not present any evidence during his sentencing to meet his burden of proving that it was clearly improbable that the weapon was connected with the offense. Therefore, the sentencing enhancement was correctly applied.

2. Jimmy Ray Valentine

Jimmy Ray's pre-sentence report recommended that his base offense level be increased by four levels because of his leadership role in the conspiracy, pursuant to U.S.S.G. § 3B1.1(a). The district court declined to do so because it was "unconvinced that he was an organizer/leader." The court found that Jimmy Ray "appears to have organized some of the major crack purchases, but did not exercise such control over the overall conspiracy that he can fairly be considered a leader/organizer in that role." Therefore, the court increased his base offense level by two levels, pursuant to U.S.S.G. § 3B1.1(c).

Jimmy Ray argues that the district court erred when it applied the two-level sentencing enhancement because Yusef Phillips was the kingpin of the organization, not he.

The government bears the burden of proving the applicability of an enhancement under § 3B1.1 of the sentencing guidelines by a preponderance of the evidence. *United States v. Finkley,* 324 F.3d 401, 403 (6th Cir. 2003). We review a district court's factual determinations on this issue under the "clearly erroneous" standard, and the application of the sentencing guidelines to these facts is a question of law that we review *de novo. Ibid.*

In order for the court to apply an enhancement under this section, a conspirator must be found to have been "the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1, comment. (n.2). Jimmy Ray points to testimony at trial that indicates he was not a leader, and that others including Phillips and Charles Bennett were the organizers. However, it is clear that there can "be more than one person who qualifies as a leader or organizers of a criminal association or conspiracy." U.S.S.G. § 3B1.1, comment. (n.4).

There was more than enough uncontradicted evidence at trial that Jimmy Ray was at least a manager or supervisor of one or more other participants in the conspiracy. Witnesses testified that Jimmy Ray oversaw the activities of several other co-conspirators, including Johnny, Corey, Dedrick, and Kenya Valentine. The district court found that he had organized some of the major crack purchases. The district court did not err when it enhanced his base offense level by two levels, pursuant to § 3B1.1(c).

D. Determination of Drug Amounts

Kenneth, Dedrick, and Corey Valentine argue that the district court erred when it determined that Kenneth and Corey were responsible for a course of conduct that involved the distribution of at least 1.5 kilograms each of crack, and that Dedrick was responsible for distributing 283.5 grams of crack.

Factual findings made by the district court are subject to the "clearly erroneous" standard of review on issues arising under the sentencing guidelines. 18 U.S.C. § 3741(e): *United States v. Ledezma,* 26 F.3d 636, 646 (6th Cir. 1994). The government must prove

the amount of drugs involved for sentencing purposes by a preponderance of the evidence. *Ledezma,* 26 F.3d at 646.

1. Kenneth Valentine

Kenneth argues that the district court could not specify the transactions for which he was responsible, that the testimony regarding drug amounts was vague, and that the witnesses were unreliable. He argues that he should be held responsible only for transactions that he agreed to jointly undertake, and should not be held liable for previous or subsequent transactions that he did not jointly undertake. He also argues that some witnesses were not specific as to whether he was buying or selling crack or powder cocaine.

The district court found that "[a] preponderance of the evidence does support the conclusion that the conspiracy purchased at least 1.5 kilograms of crack cocaine and a great deal more. Furthermore, preponderance of the evidence establishes this quantity was known by the Defendant or was reasonably foreseeable to him." The district court made this finding in spite of its belief that the quantity figures advanced by the government were inflated.

The district court did not commit clear error in its determination of the amount of drugs for which Kenneth was responsible. The district court properly erred on the side of caution and only held him responsible for that quantity of drugs for which he was more likely than not actually responsible. The district court's finding was valid because its determination was made on the basis of the totality of the evidence, and because the witnesses corroborated

each other's testimony. *See Owusu,* 199 F.3d at 345. Based on the testimony, the determination that the conspiracy involved at least 1.5 kilograms of crack was conservative.

2. Dedrick Valentine

Dedrick Valentine has adopted the claims of his co-defendants, but has not submitted any argument on this claim. He was found responsible for 283.5 grams of crack. The act that led to his conviction for distribution of crack involved only 5.626 grams of crack. The district court found that he could reasonably foresee that at least 150 grams of crack were involved in the drug activities that he and his co-defendants undertook. The court was troubled by inclusion of acquitted conduct as relevant conduct for the purposes of sentencing, and did not hold him responsible for the conduct of other co-conspirators. The district court noted, however, that the testimony of three witnesses established that Dedrick himself sold over 150 grams of crack, the minimum amount necessary to establish a base offense level of 34. The testimony of these witnesses was uncontradicted. The district court did not err when it determined Dedrick was responsible for over 150 grams of crack.

3. Corey Valentine

Corey Valentine also has not submitted any argument on this claim. He was found responsible for over 1.5 kilograms of crack. The district court found that the government had carried its burden of proving by a preponderance of the evidence that the conspiracy was responsible for this amount. The court found that the evidence established that this quantity of crack was known to Corey, and was certainly foreseeable to him as part of the conspiracy. The court

noted that one witness stated that Corey made approximately twenty trips to Arkansas to pick up multiple kilograms of crack. The district court did not clearly err when it determined that Corey was responsible for 1.5 kilograms of crack.

E. Apprendi Claims

Jimmy Ray, Kenneth, Dedrick, Johnny, and Corey Valentine argue that their sentences should be vacated and remanded in light of the Supreme Court's decision in *Apprendi*. *Apprendi* was decided on June 26, 2000, after all the defendants had been sentenced. However, the defendants did not object to the judge making the determination of drug quantities, and thus the review is for plain error. Fed.R.Crim.P. 52(b); *United States v. Page,* 232 F.3d 536, 543 (6th Cir. 2000). Unless there is an "error" that is "plain" under current law and that affects substantial rights, we cannot correct an error. *Johnson v. United States,* 520 U.S. 461, 466-67 (1997); *United States v. Calloway,* 116 F.3d 1129, 1136 (6th Cir. 1997). If the three conditions are met, we may then exercise discretion and notice the error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson,* 520 U.S. at 467.

21 U.S.C. § 841(b)(1)(C) provides for a maximum penalty of 20 years unless the crime involves a specific quantity of drugs as set forth in subsections (A) or (B). These subsections provide for a maximum sentence of 40 years if the crime involved 5 grams or more of crack, *see* § 841(b)(1)(B), and a maximum sentence of life in prison if the crime involved 50 grams or more of crack, *see* § 841(b)(1)(A).

1. Dedrick and Corey Valentine

Dedrick and Corey Valentine argue that they were deprived of their right to trial by jury because the element of quantity of drugs was not submitted to the jury. However, a jury did find Dedrick and Corey guilty beyond a reasonable doubt of every element of the crimes for which they were charged. Dedrick was sentenced to 168 months of imprisonment, and Corey was sentenced to 235 months of imprisonment. Dedrick was convicted pursuant to 21 U.S.C. § 841(a)(1), and Corey was convicted pursuant to 21 U.S.C. §§ 846 and 841(a). Neither of their sentences exceeds the statutory maximum of 240 months prescribed for being found guilty of conspiracy to possess with intent to distribute or distributing any quantity of a controlled substance. 21 U.S.C. § 841(b)(1)(C). Thus, there was no error. Their adopted arguments regarding the application of *Apprendi* to the sentencing guidelines will be addressed below.

2. Kenneth Valentine

Kenneth argues that he raised the issue of *Apprendi* error before sentencing. However, as discussed below, no error was committed.

Kenneth was sentenced to 292 months of imprisonment. Kenneth had a previous drug conviction. 21 U.S.C. § 851 provides the procedures for enhancing a sentence for a prior conviction. The government complied with § 851 when it served and filed upon Kenneth Valentine an Information and Notice of Defendant's Prior Felony Drug Conviction. The maximum sentence for a conviction under § 841(b)(1)(C) after a prior conviction for a felony drug

offense is 30 years. Kenneth's sentence did not exceed this maximum, and thus was not error.

He also argues that *Apprendi* applies to the sentencing guidelines as the guidelines are legislative acts. We have previously held that *Apprendi* does not apply to a penalty under the sentencing guidelines as long as the penalty is not in excess of the statutory maximum. *United States v. Garcia*, 252 F.3d 838, 843 (6th Cir. 2001).

3. Jimmy Ray Valentine and Johnny Valentine

Jimmy Ray and Johnny Valentine were both convicted pursuant to 21 U.S.C. §§ 846 and 841(a), and both sentenced to 292 months of imprisonment. Their sentences exceed the statutory maximum of 240 months, as the jury did not find beyond a reasonable doubt drug quantities that would allow for a higher statutory maximum. The government concedes for the purposes of this appeal that the district court's instruction on quantity constituted plain error in light of *Apprendi*.[7] However, the government argues that the error did not affect appellants' substantial rights, and does not require reversal.

We follow the reasoning in *Cotton*, in which the Supreme Court declined to address whether a similar error affected the defendants' substantial rights, because even assuming they were affected, "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at

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[7] The district court instructed the jury that quantity was not an element of the offense. This instruction was in accordance with applicable circuit precedent at the time.

632-33. As in *Cotton,* the evidence that the conspiracy here involved at least 5 grams of crack is "overwhelming" and "essentially uncontroverted." 535 U.S. at 633.

The amount of drugs involved in the conspiracy was conservatively estimated at between 50 and 75 kilograms of crack. It is clear beyond a reasonable doubt that had the jury been properly charged, it would have found the conspiracy to have involved at least 5 grams of crack, which would allow a maximum sentence of 40 years. 21 U.S.C. § 841(c)(1)(B)(iii). As the error of sentencing Johnny and Jimmy Ray Valentine in excess of the maximum allowable statutory penalty "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," *Cotton,* 535 U.S. at 632-33, because it is clear beyond a reasonable doubt that any jury would have found that the conspiracy involved more than 5 grams of crack, we decline to notice the error.

V

We therefore AFFIRM appellants' convictions and sentences.

Filed: July 17, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMY RAY VALENTINE,

Defendant.

Case No. 1:99-CR-01-02

HON. RICHARD ALAN ENSLEN

ORDER

This matter is before the Court on Defendant's Motion for Leave of Court to Amend, in which Defendant requests the Court grant him leave to amend his Motion brought under 28 U.S.C. § 2255 in light of the Supreme Court's decision of *Blakely v. Washington,* Dkt. No. 02-1632, 2004 U.S. LEXIS 4573 (June 24, 2004). The court in *Blakely* redefined the term "statutory maximum" as used in the Court's prior decision *Apprendi v. New Jersey,* 530 U.S. 466 (2000); therefore, *Blakely* is an extension of the *Apprendi* rule rather than a new rule in itself. *Patterson v. United States,* No. 03-CV-74948, 2004 U.S. Dist. LEXIS 12402, at *13 n.3 (E.D. Mich. June 25, 2004). Those courts that have addressed the issue of whether *Blakely* is applicable retroactively have found that it is not. *Patterson,* 2004 U.S. Dist. LEXIS 12402, at *13 n.3; *United States v. Traeger,* No. 04-2685 (N.D. Ill. July 9, 2004). Furthermore, the Supreme Court's recent decision in *Schriro v. Summerlin,* 124 S. Ct. 2519 (U.S. June 24, 2004) suggests that *Blakely* is not

applicable retroactively. This Court, therefore, finds that *Blakely* may not be applied retroactively to Defendant's Motion and, as a result, any amendments to his Motion based on *Blakely* would be futile.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Leave to Amend (Dkt. No. 507) is **DENIED**.

Richard Alan Enslen
United States District Judge

Dated in Kalamazoo, MI:
July 21, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Case No. 1:99-CR-1-2
v.	HON. RICHARD ALAN ENSLEN
JIMMY RAY VALENTINE,	
Defendant.	OPINION

This matter is before the Court on Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, in which Defendant claims he was denied effective assistance of counsel. For the reasons that follow, Defendant's Motion will be denied.

I. Procedural History

On January 13, 1999, an Indictment was issued against Defendant Jimmy Ray Valentine and several other individuals, charging them with conspiracy to distribute and possession with intent to distribute cocaine, crack cocaine, and marijuana. A jury trial commenced on January 24, 2000, and Defendant was found guilty on February 11, 2000. Defendant appealed his sentence to the Sixth Circuit Court of Appeals, who affirmed the guilty verdict. Defendant now moves for relief under 28 U.S.C. § 2255.

II. Standard of Review

A prisoner may bring a motion under 28 U.S.C. § 2255 if he claims his sentence was imposed in violation of the Constitution. In his Motion, Defendant claims he was denied effective assistance of counsel in violation of the Sixth Amendment of the Constitution. In order to prevail on a claim of ineffective assistance, a defendant must show two things: first, that his counsel made errors so serious that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and second, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The first prong of the test, attorney performance, is judged by "reasonableness under prevailing professional norms." *Id.* at 688. In evaluating this prong, the court must be "highly deferential" to counsel's performance and avoid being guided by the benefits of hindsight. *Id.* at 689. In order to meet the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.*

III. Analysis

Defendant makes six arguments why his counsel rendered ineffective assistance, which the Court now reviews in turn.

A. Counsel's Absence

Defendant first argues his counsel rendered ineffective assistance by being absent during two stages of the proceedings. In particular, Defendant argues his counsel was required to be present when the Court sent the jury a note informing them they would have to either reach a verdict by noon that day or be discharged until the following Tuesday morning. Defendant also argues his counsel was required to be present when the Court granted a petition by the government to compel testimony and to seal.

Neither of these instances constitute ineffective assistance because they both fail the first prong of the *Strickland* test. In the first instance, Defendant fails to show how he was prejudiced by his counsel's absence during the reading of the note. Not only was an objection to the Court's note raised by a co-defendant and overruled, but Defendant also fails to show that the jury would have reached a different verdict had they not been given the note. The note merely placed reasonable restrictions on the times during which the jury could deliberate but did not in any way limit the length of time the jury had to reach a verdict or alter the jury instructions in any way. Similarly, Defendant has failed to show he was prejudiced by his counsel's absence during the government's petition to compel testimony and to seal because he has not identified any valid objections his counsel could have made that would have led the Court to deny the petition.

Defendant argues these absences occurred during critical stages of the proceedings against him and therefore create a presumption of prejudice. When Defendant's counsel is absent during a "critical

stage" of a criminal proceeding, the Court will presume prejudice under the *Strickland* standard. *Caver v. Straub,* 349 F.3d 340, 349 (6th Cir. 2003) (citing *United States v. Cronic,* 466 U.S. 648, 659 (1984)). A critical stage is one that holds "significant consequences" for the defendant, like arraignment or adversarial testing. *Id.* (citing *Bell v. Cone,* 535 U.S. 685, 695-96 (2002)). In the Sixth Circuit, the re-instruction of a jury and the reading of supplemental jury instructions both constitute critical stages during which defense counsel must be present. *See Caver,* 349 F.3d at 350 (re-instruction of jury); *French v. Jones,* 332 F.3d 430, 439 (6th Cir. 2003) (supplemental instructions). However, the mere repetition of an instruction to the jury does not constitute a critical stage and therefore does not require the presence of defense counsel. *Hudson v. Jones,* 351 F.3d 212, 218 (6th Cir. 2003).

In this case, the Court informed the jury that they would have to end their deliberations for the day at noon but could continue their deliberations on a later date. This is not a supplemental instruction regarding the charges against Defendant or a re-instruction of the jury but a mere procedural instruction that did not hold any significant consequence. As a result, the Court should not presume prejudice, and the *Strickland* test applies. Similarly, the decision regarding the Government's petition to compel testimony and to seal does not constitute a critical stage in the proceedings because it did not hold significant consequences for Defendant. *Cf. Bell,* 535 U.S. 695-96 (listing arraignment and adversarial testing as examples of critical stages of proceedings). For these reasons, the Court rejects Defendant's argument that his counsel's absence at

certain stages of the proceedings constituted ineffective assistance.

B. Right to Testify

Defendant also argues his counsel rendered ineffective assistance by failing to advise him of his right to testify. However, Defendant was informed by the Court of his right to testify during his arraignment on February 23, 1999 and therefore cannot claim that he was unaware of this right or would have acted differently had he been informed by counsel of this right. Defendant's claim of ineffective counsel on this ground fails.

C. Specific Intent

Defendant argues his counsel rendered ineffective assistance by failing to object to jury instructions that omitted the essential element of specific intent. Courts in the Sixth Circuit are advised not to give a general instruction on specific intent in criminal cases. THE PATTERN CRIMINAL JURY INSTRUCTIONS COMMITTEE OF THE SIXTH CIRCUIT DISTRICT JUDGES ASSOCIATION, SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS § 2.07 cmt. (1991). Instead, the Court should "define the precise mental state required to convict as part of the court's instructions defining the elements of the offense." *Id.* The Court finds that the instructions given properly defined the level of intent necessary for conspiracy under the statute. As a result, even if Defendant's counsel had objected to the given instruction, the objection would have been denied.

D. George Stewart

Defendant also argues his counsel provided ineffective assistance when he failed to request a special jury instruction regarding witness George

Stewart, who was a paid government informant. Because the Court gave an instruction to the jury regarding Stewart's status as a paid informant, any objection arguing that no such instruction given would have been denied.

E. Jury Selection

Defendant argues his counsel was ineffective during jury selection because his counsel did not object when the government dismissed the only black juror in this case. An objection was raised by a co-defendant's counsel when the United States exercised its peremptory challenge to strike this juror, and the Court upheld the use of the challenge, based on the United States' argument that it had non-discriminatory reasons for striking the juror. Although Defendant believes the United States struck this juror because it wished to have an all-white jury, he raises no evidence to support this claim and therefore fails to show the juror would have been allowed to sit on the jury had his counsel objected to the removal. Therefore, Defendant's argument on this ground is denied.

F. Plea

Defendant's final argument is that his counsel provided ineffective assistance when he failed to inform the United States of Defendant's willingness to accept the United States' plea offer of ten years. The United States claims it never made a ten year plea offer, and the only evidence Defendant provides in support of his allegation that such an offer was made is his own signed affidavit. The Court finds that Defendant has not presented specific, credible evidence supporting his claim on this ground and therefore will deny this request for relief. *See Moss v. United States,* 323 F.3d

445, 475 (6th Cir. 2003) (denying relief when defendant maintained his innocence throughout trial and failed to produce specific and credible evidence that attorney rendered ineffective assistance by not exploring plea negotiations).

IV. Conclusion

For the above reasons, the Court finds Defendant was not denied effective assistance of counsel under the Sixth Amendment and will therefore deny his Motion brought under 28 U.S.C. § 2255. An Order consistent with this Opinion shall be issued.

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

Dated in Kalamazoo, MI:

August 12, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Case No. 1:99-CR-1-2
v.	HON. RICHARD ALAN ENSLEN
JIMMY RAY VALENTINE,	
Defendant.	**ORDER**

In accordance with the Opinion filed this day,

IT IS HEREBY ORDERED that Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Dkt. No. 498) is **DENIED**.

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

Dated in Kalamazoo, MI:
August 12, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMY RAY VALENTINE,

Defendant.

Case No. 1:99-CR-1-2

HON. RICHARD ALAN ENSLEN

ORDER

This matter is before the Court on Defendant's Application for a Certificate of Appealability. (Dkt. No. 520.) Defendant seeks to appeal this Court's denial of Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, in which Defendant claimed he was denied effective assistance of counsel. For the reasons that follow, Defendant's Application for Certificate of Appealability will be denied.

I. Standard of Review

Defendant is seeking to initiate an appeal of the Court's dismissal of his habeas petition. Defendant filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Therefore, the right to appeal is governed by the requirements found at 28 U.S.C. § 2253(c), which provides that such an appeal may not be taken unless a circuit justice or judge issues a certificate of appealability (COA). Furthermore, the COA may issue only if the applicant has made a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel,*

529 U.S. 473, 483 (2000). Where, as in this case, this Court denied Defendant's constitutional claims on the merits, the defendant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. *See also Frazier v. Huffman,* 343 F.3d 780, 788 (6th Cir. 2003). Furthermore, if a COA is granted, the district court "shall indicate which specific issue or issues satisfy the showing required." *Frazier,* 343 F.3d at 789 (citing 28 U.S.C. § 2253(c)(3)).

II. Analysis

Defendant requests a COA regarding two issues: First, Defendant moves to amend his motion under 28 U.S.C. § 2255 in light *of Blakely v. Washington,* ___ U.S. ___, 124 S. Ct. 2531 (June 24, 2004). Second, Defendant makes five arguments that he was denied his Sixth Amendment right to effective assistance of counsel.

Defendant moves to amend his § 2255 Motion in light of *Blakely.* Title 28 U.S.C. § 2242 allows habeas corpus claims to "be amended or supplemented as provided in the rule of procedure applicable to civil actions." However, under current Supreme Court case law, amendments are not allowed if the amendment would be futile. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Int'l Bhd. of Teamsters, Local 519 v. UPS,* 335 F.3d 497, 504-05 (6th Cir. 2003). In this case, *Blakely* is inapplicable under current Sixth Circuit case law. *United States v. Koch,* __ F.3d __, 2004 FED App. 0284P (6th Cir. Aug. 26, 2004). Therefore,

Defendant's Motion to Amend is denied because such an amendment would be futile.[1]

Defendant then makes five arguments as to why he was denied his constitutional right to effective assistance of counsel. In denying Defendant's 28 U.S.C. § 2255 Motion, the Court found that these same arguments did not meet the standard for ineffective assistance of counsel under the Sixth Amendment set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). The Court found that Defendant had not presented specific, credible evidence supporting his claim.

The Court now finds that Defendant has not made any additional showings which would constitute a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel,* 529 U.S. 473, 483 (2000). Furthermore, the Defendant has not demonstrated "that reasonable jurists would find the [Court's] assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. *See also Frazier v. Huffman,* 343 F.3d 780, 788 (6th Cir. 2003).

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[1] This decision is unlikely to prejudice Defendant since a contrary ruling by the Supreme Court in *Booker* and *Fanfan* cases would provide grounds for leave to file a successive § 2255 motion. *See* 28 U.S.C. § 2255.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Application for Certificate of Appealability (Dkt. No. 520) is **DENIED.**

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:

9-30-04

No. 04-2116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIMMY RAY VALENTINE,	)	
Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	1:99crl Enslen

Before: MARTIN, Circuit Judge.

Jimmy Ray Valentine pro se from a district court judgment that dismissed a motion to vacate his sentence under 28 U.S.C. § 2255. The receipt of his timely appeal has been construed as an application for a certificate of appealability under Fed. R. App. P. 22(b).

To obtain a certificate of appealability, Valentine must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An initial review of the record indicates that he has met this threshold burden.

Accordingly, the application for a certificate of appealability is granted, counsel is appointed to represent Valentine, and the clerk's office is directed to establish a briefing schedule on the following issues: 1) whether Valentine was denied the effective assistance of counsel for any of the reasons that were alleged in his § 2255 motion; and 2) whether he should have been allowed to amend his § 2255 motion to raise

a claim under *Washington v. Blakely,* 124 S. Ct. 2531 (2004).

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Filed: April 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIMMY RAY VALENTINE,

Petitioner-Appellant,

v. ORDER

UNITED STATES OF AMERICA,

Respondent-Appellee. Filed Dec. 17, 2007

BEFORE: MARTIN and COOK, Circuit Judges; and BUNNING,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active **judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

**Judge Sutton recused himself from participation in this ruling.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

February 21, 2008

Clerk
United States Court of Appeals for the Sixth Circuit
524 Potter Stewart Courthouse 100 East Fifth Street
Cincinnati, OH 45202

Re: Jimmy Ray Valentine
v. United States
Application No. 07A698 (Your No. 04-2116)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 21, 2008 extended the time to and including May 15, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
Erik A. Fossum Case Analyst

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JIMMY RAY VALENTINE,
KENNETH JEROME VALENTINE,
CHARLES EDWARD BENNETT,
COREY TIWANE VALENTINE,
DEDRICK QUWANTA VALENTINE,
JOHNNY VALENTINE,
ROBERT DONTRALL SHARP,
KENYA LEVELLE VALENTINE,
JOSEPH MALONE, JR.
Defendants.

No. 1:99-CR-01
Hon. Richard Alan Enslen

SECOND SUPERSEDING INDICTMENT

Filed July 22, 1999

The Grand Jury charges:

COUNT 1

From in or about 1991 through and including January 12, 1999, in the Western District of Michigan, Southern Division, and elsewhere,

JIMMY RAY VALENTINE,
KENNETH JEROME VALENTINE,
CHARLES EDWARD BENNETT,
COREY TIWANE VALENTINE,
DEDRICK QUWANTA VALENTINE,
JOHNNY VALENTINE,
ROBERT DONTRALL SHARP,
KENYA LEVELLE VALENTINE,
JOSEPH MALONE, JR.

defendants herein, did knowingly, willfully and unlawfully combine, conspire, confederate and agree together and with other persons both known and unknown to the Grand Jury to unlawfully distribute and possess with intent to distribute cocaine, cocaine base (crack cocaine), and marijuana, in violation of Title 21, United States Code, Sections 846 and 841(a).

OBJECTS, MEANS AND METHODS

The principal object of this conspiracy was to make money from the illegal distribution and sale of cocaine, cocaine base (crack cocaine), and marijuana.

It was part of the conspiracy that JIMMY RAY VALENTINE would secure kilogram amounts of cocaine and cocaine base (crack cocaine) and quantities of marijuana for distribution to other drug dealers in Southwest Michigan.

At certain times during the conspiracy, JIMMY RAY VALENTINE secured kilogram quantities of cocaine and cocaine base (crack cocaine) from Jerry Lee Butler of Arkansas.

At certain times during the conspiracy, JIMMY RAY VALENTINE secured cocaine, cocaine base (crack cocaine) and marijuana from drug suppliers, other than Jerry Lee Butler, both known and

unknown to the Grand Jury, in California, Texas and other locations in and out of the State of Michigan.

At various times during the conspiracy, COREY TIWANE VALENTINE would transport cocaine and cocaine base (crack cocaine) from Arkansas to the area of Benton Harbor, Michigan at the direction of JIMMY RAY VALENTINE.

It was further part of the conspiracy that KENNETH JEROME VALENTINE, CHARLES EDWARD BENNETT, Yuseff Phillips, COREY TIWANE VALENTINE, DEDRICK QUWANTA VALENTINE, JOHNNY VALENTINE, ROBERT DONTRALL SHARP, Virece Lamont Kazee, KENYA LEVELLE VALENTINE, Nicholas Washington, and JOSEPH MALONE, JR., and others known and unknown to the grand jury, would distribute cocaine, cocaine base (crack cocaine) and marijuana secured by JIMMY RAY VALENTINE to others for resale and use.

It was further part of the conspiracy that members of the conspiracy utilized telephones and telephonic pagers to maintain contact with each other and with customers to facilitate their unlawful and illegal trade in cocaine, cocaine base (crack cocaine) and marijuana.

It was further part of the conspiracy that in order to protect their controlled substances and the ill-gotten gains from the sale of controlled substances, and to intimidate others, various co-conspirators would secure and maintain various firearms.

21 U.S.C. § 846(a)
21 U.S.C. § 841(a)
21 U.S.C. § 841(b)(1)(a)

COUNT 2

On or about August 20, 1998, in Berrien County, in the Western District of Michigan, Southern Division,

DEDRICK QUWANTA VALENTINE,

defendant, did knowingly and intentionally distribute a quantity of cocaine base (crack cocaine), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(B)(iii)

COUNT 3

On or about June 20, 1999, in Berrien County, in the Western District of Michigan, Southern Division,

JOSEPH MALONE, JR.,

defendant, did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(D)

COUNT 4

(Forfeiture Allegations)

The Grand Jury realleges Count 1 of this Indictment as fully set forth herein. In committing the felony offense(s) alleged in Count 1 of this Indictment, punishable by imprisonment for more than one year, in violation of Title 21, U.S.C. §§ 846 and 841, Defendants,

Jerry Lee Butler,
JIMMY RAY VALENTINE, and
CHARLES EDWARD BENNETT,

shall forfeit to the United States any and all property constituting or derived from any proceeds, the said Defendants obtained directly or indirectly as a result of the said violations and any and all property used, or intended to be used, in any manner or part to commit and to facilitate the commission of violations of Title 21, U.S.C. §§ 846 and 841 alleged in Count 1 including, but not limited to the following:

1. Bank Account

   All United States currency funds or other monetary instruments credited to Account Number 2805354773, in the name of Jimmy Ray Valentine, located at Shoreline Bank, St. Joseph, Michigan, with a balance of $6,600.00 as of March 9, 1999, plus accrued interest.

2. Currency

   a. Approximately $10,296.40 in United States currency seized from 794 Monroe Street, Benton Harbor, Michigan, the structure operating as C & S Mini Mart, on or about February 11, 1999;

   b. Approximately $4,616.00 in United States currency seized from 134 Hastings Street, Benton Harbor, Michigan, the residence of Charles Edward Bennett, on or about September 22, 1998;

   c. Approximately $1,899.00 in United States currency seized from Jimmy Ray Valentine on or about September 23, 1998;

   d. Approximately $1,081.00 in United States currency seized from the wallet of Jimmy

Ray Valentine, at 1980 Hatch Street, Benton Harbor, Michigan, on or about February 11, 1999.

3. Mutual Fund

Any and all interest, including accrued earnings, in BISYS Mutual Fund Account No. 28248995 in the name of Jimmy Ray Valentine with a balance of $46,862.63 as of March 31, 1999, and all interest accrued thereafter.

4. Net Cash Proceeds

By virtue of the commission of the felony violations alleged in Count 1 of this Indictment, which Count is realleged and incorporated as if more fully set forth herein, Defendants Jerry Lee Butler, JIMMY RAY VALENTINE, and CHARLES EDWARD BENNETT, shall forfeit to the United States the sum of $750,000.00 which sum represents the aggregate of monies received in exchange for their involvement in the sale and distribution of cocaine, cocaine base (crack cocaine), and marijuana, and constitute proceeds derived from the sale and distribution of cocaine, cocaine base (crack cocaine), and marijuana, or is traceable thereto.

5. Substitute Assets

If any of the above-described forfeitable property, as a result of any act of omission of the Defendants Jerry Lee Butler, JIMMY RAY VALENTINE, and CHARLES EDWARD BENNETT,

a. cannot be located upon exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property that cannot be divided without difficulty,

the United States will then seek the forfeiture of any other substitute property belonging to Defendants pursuant to Title 21, United States Code, Section 853(p), up to the value of the above properties listed above as being subject to forfeiture.

By virtue of the commission of the felony offenses charged in this Indictment by Defendants Jerry Lee Butler, JIMMY RAY VALENTINE, and CHARLES EDWARD BENNETT, in the above described properties is vested in the United States and shall be forfeited to the United States pursuant to Title 21, United States Code, Section 853.

21 U.S.C. § 853
21 U.S.C. § 846
21 U.S.C. § 841

A TRUE BILL

_____

Grand Jury Foreperson

MICHAEL H. DETTMER (P12709)
United States Attorney

BRIAN K. DELANEY (P45101)
Assistant United States Attorney
Post Office Box 208
Grand Rapids, Michigan 49501-0208
616/456-2404

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Vs.

JIMMY RAY VALENTINE,
KENNETH JEROME VALENTINE,
CHARLES EDWARD BENNETT,
COREY TIWANE VALENTINE,
DEDRICK QUWANTA VALENTINE,
JOHNNY VALENTINE,
ROBERT DONTRALL SHARP,
KENYA LEVELLE VALENTINE,

JOSEPH MALONE, JR.

Defendants.

No. 1:99-CR-01

February 9, 2000

Hon. Richard Alan Enslen

[THE COURT:] . . . would have constructive possession of it while it was in the actual possession of your friend.

But understand just being present where something is located does not equal possession. Two or more people can share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned. But remember that just being present with others who have possession is not possession.

You heard a lot of testimony about quantities, but the Government is not required to prove that defendants conspired to distribute or possess with intent to distribute any particular amount of cocaine or cocaine base; in other words, crack cocaine, or marijuana. Quantity is simply not an element in this offense.

How do you prove a defendant's state of mind? Ordinarily, there is no way that a defendant's state of mind or anybody's state of mind can be proven directly because no one can read another person's mind and tell what that person is thinking. But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted and any other facts or circumstances and evidence that show what was on the defendant's mind. You may also . . . .

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

No.
1:99-CR-1-02

vs.

JIMMY RAY VALENTINE,
KENNETH JEROME VALENTINE,
CHARLES EDWARD BENNETT,
COREY TIWANE VALENTINE,
DEDRICK QUWANTA
VALENTINE,
JOHNNY VALENTINE,
ROBERT DONTRALL SHARP,
KENYA LEVELLE VALENTINE,

JOSEPH MALONE, JR.
Defendants.

SENTENCE
Hon. Richard
Alan Enslen
May 19, 2000

THE COURT: The record will obviously indicate that some people don't understand what the proceeding is this afternoon. It was not my responsibility to find the defendants guilty or not guilty. That was the responsibility of the jury, and the jury has spoken. It was not my responsibility to decide if somebody was telling the truth or not, that was the jury's. The jury has spoken. Nothing I can do about that, at least at sentencing. The only thing I could possibly do about that, if there were different kinds of motions in front of me at a different time, that's not the case, and it's not my place.

Second thing is Congress. Congress is the one that set the penalties, not me. And why did Congress set the penalties, because somebody like Ella Valentine's son killed himself by smoking crack. About six or seven years ago, Len Bias was a basketball player who had just been drafted by the Boston Celtics. The night he was drafted he smoked some crack and he died. And Ms. Bias went on the rampage, she went to Congress, she went all over to get the people that killed her son. Who were those people? Well, one of them is sitting right here in the courtroom. Anybody that sells crack cocaine takes the chance of killing a human being. Did Jimmy Ray Valentine kill anybody? I don't have any idea, he doesn't have any idea. But if he did, then the responsibility is on him.

Let's talk about responsibility. There it is. I'm not the one that decides whether or not life is the right amount. The reason that crack cocaine penalty is so high is because of Len Bias. Because Congress found it convenient and maybe correct even to set a higher penalty for crack than for powdered cocaine. Is that the right thing to do? Ask your Congressman, I live with the same law.

The guidelines suggest that Mr. Valentine has to do life in prison. Do I think that's fair, no. Do I have anything to say about it, no. I do have a right to rule on the objections and I'm going to rule on the objections right now.

The first objection that the Court wants to talk about is the relevant conduct, which is the Base Offense Level this defendant started off with, which is a 38. The score was predicated on the conclusion the defendant was responsible for at least 1.5 kilograms of

crack cocaine. Defendant argues the scoring is inaccurate.

For sentencing purposes, calculation of the amount of drugs involved in a crime has to be supported by the preponderance of the evidence. Where the amount of drugs is uncertain, the District Court is encouraged to err on the side of caution and only hold the defendant responsible for the quantity of drugs for which the defendant is more likely than not actually responsible. Guideline 2D1.1(c)(1) provides that a defendant shall be assessed a base offense level of 38 for offenses that involve at least 1.5 kilograms of crack cocaine.

Uncontradicted evidence at trial, meaning nobody saying the opposite, after listening to all the evidence there was the jury deciding only on what it heard, decided that there was a conspiracy to purchase coke and re-sell it to dealers and addicts. Some of that evidence was offered by Jerry Lee Butler, who was a resident of Marianna Arkansas, some of it was offered by Yusef Phillips, some of it was offered by others. The Court's memory about Butler's testimony, which has been talked about today, was that he sold crack to this defendant three to five times, that this defendant purchased one to two kilos in those transactions. That's far above 1.5 kilograms, and as I said before, nobody contradicted Jerry Lee Butler. This uncontradicted evidence established that tens of thousands of dollars were transported by a variety of co-conspirators to Arkansas, and that crack cocaine was then purchased and brought back to Michigan. These witnesses testified that the total amount of crack purchased by the defendant and his co-conspirators from Mr. Butler was somewhere

between 50 kilograms and 60 kilograms, a great deal more than 1.5.

Furthermore there was evidence from Lubert Brock, that the defendant was involved in the purchase of crack cocaine from California.

Application Note 2 to 1B1.3 provides:

"In order to determine the defendant's accountability for the conduct of others under Subsection a(1) (B), the Court must first determine the scope of the criminal activity the particular defendant agreed to undertake. The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision."

The Sixth Circuit has held that, "A defendant is accountable for the conduct of other conspirators only if that conduct was, one, reasonably foreseeable to him; and two, in furtherance of the jointly undertaken criminal activity."

Here, the evidence at trial indicated the defendant agreed with some of the co-conspirators to purchase large quantities of crack from Arkansas, bring that crack back to Michigan, resell it to the Len Biases of Benton Harbor. Therefore, for the purpose of Guideline 1B1.3, the Court concludes that defendant's jointly undertaken criminal activity was the purchase of crack cocaine from a source in Arkansas and California.

Having concluded it was jointly undertaken, the question is was the-- in what quantity of crack cocaine was reasonably foreseeable to this defendant, Jimmy Ray Valentine? Trial testimony indicated the defendant was involved in, as I've indicated before, three to five purchases in Arkansas of one to two kilograms per transaction. Was that reasonably foreseeable? He is the one that did it. Not a question of being reasonably foreseeable, he was there.

Trial testimony indicates he was involved in multiple kilogram purchase from Arkansas. Brock says some from California. I don't credit that worth much, I do credit what Butler said. While the Court might have misgivings about the total amount of crack, whether it is 50 to 60 kilos or not, I have no trouble finding that this defendant purchased and possessed at least 1.5 kilograms of crack cocaine.

Furthermore, a preponderance of the evidence establishes that this quantity was either known by the defendant personally because he was there or was reasonably foreseeable to him. As a result, defendant's objection to drug quantity is overruled.

With regard to the possession of firearms, different subject. Guideline 2D1.1(b)(1) provides that a defendant's offense level shall be increased by two levels if a dangerous weapon was possessed. Defendant admits he possessed a shotgun in his home. However, he argues that pursuant to U.S. vs. Cooper, an 11th Circuit case, because the shotgun was used for hunting, not related to the offense, the enhancement should not apply.

The Court is unconvinced that the shotgun was related to defendant's criminal conduct, and therefore, will sustain the objection and not apply the

enhancement. The only evidence concerning the shotgun was that defendant possessed it, that he may have threatened a girlfriend with it, and he may have talked about it on a tape after he was arrested. There is no evidence defendant ever possessed the shotgun during any of his criminal conduct, and there was contradictory testimony regarding whether the criminal conduct took place in his home, where the shotgun was located. Given these facts, and more importantly the lack of any evidence establishing a nexus between the shotgun and the criminal activity, the enhancement should not have been applied on the basis of defendant's shotgun. The Court looks at United States vs. Cruz, a Sixth Circuit case in 2000 reported only at West Law 377060, implying a weapon must be possessed during the conduct relevant to the charged offense for the Guideline 2D1.1(b)(1) to apply.

In United States vs. Shields, an Eighth Circuit case in 1995, 2D1.1(b)(1) was inapplicable when the firearm was found in defendant's home after the drug activity occurred because there was no evidence that it was present during the alleged illegal activity and so forth.

Government also arguing the enhancement should apply because it was reasonably foreseeable to defendant that a firearm would be used in the robbery of Abdul Moore. While it is true that the testimony of Yusef Phillips did indicate that defendant participated in the original decision to rob Moore, Phillips stated defendant was not around when the decision was made to use a gun for that robbery. Although one might argue that it should have been foreseeable defendant's gun would be used in the robbery, the Court does not believe the

Government has proven this fact by a preponderance of the evidence. Therefore, the enhancement was improperly applied and defendant's offense level is reduced from the 44 I mentioned earlier to 42.

Turning to Paragraph 140, Guideline 3B1.1(a) provides that a defendant's offense level shall be increased by four levels if he was an organizer or leader of a criminal activity. Guideline 3B1.1, Application Note 4 explains that a Court should consider the following factors when determining whether an aggravating role enhancement should apply: "The exercise of decision making authority, the nature of the participation in the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of illegal activity, the degree of control exercised over others." It is the Government's burden to prove these enhancements by a preponderance of the evidence.

The Court is unconvinced that he was an organizer/leader. While it is true, he made the initial contact with Jerry Butler as a potential source for cocaine, that he pooled money with other co-conspirators to purchase that cocaine, that he negotiated and organized the terms and conditions of the purchases. He did not recruit others to participate in the conspiracy or claim a larger share of the profits for himself. Furthermore, there was little to no evidence that he exercised control over the assets for the conspiracy or other members of the conspiracy.

In the Court's judgment, the defendant is not more or less culpable than other co-conspirators. He

appears to have organized some of the major crack purchases, but did not exercise such control over the overall conspiracy that he can fairly be considered a leader/organizer in that role.

Therefore, it is the Court's judgment a two-level enhancement pursuant 3B1.1(c) should apply, and that reduces the defendant's offense level from 42 to 40.

There are factual objections that make nothing--have nothing to do with the guidelines. There's a factual objection about whether 155 North Winans is a crack house. Insofar as there's uncontradicted trial testimony of several witnesses indicated there was a second question of who operated crack house. The Court cannot recall any evidence that defendant exercised control over that address. Therefore, the Probation Office is ordered to delete the statement that this defendant exercised control over a crack house.

Defendant argues that Paragraph 44 is inaccurate because it stated he resided 1980 Hatch Street. Defendant contends he did not reside at that address. The Court orders the probation office to simply note the defendant's comment that this was not his residence.

Paragraph 121, the Court's already made conclusions on that paragraph.

Paragraph 137, the Court's already made findings on that.

Paragraph 138, the Court has sustained this objection and the Probation Officer is ordered to amend the report accordingly.

Paragraph 140, the Court has sustained that objection, the Probation Officer is ordered to amend the report.

There is a motion by the defendant for a downward departure. The Court is unable to find any law in support or facts to support an argument for a downward departure, and overrules the argument. The Court, therefore, concludes his offense level is 40, not 44 as originally ordered, and that places him in a Total Offense Level 40, Criminal History Category I, which calls for a life sentence of 292 to 365.

Am I right about that, Mr. Griffis?

MR. GRIFFIS: Exactly, Your Honor.

THE COURT: It's the sentence of the Court that the defendant, Jimmy Ray Valentine, be sentenced to the custody of the Bureau of Prisons, to be in prison for a term of 292 months, the least permitted by the guideline I have found.

Upon release from imprisonment, the defendant is ordered to be placed on supervised release for a term of five years. Within 72 hours of the release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which he is released.

While on supervised release, the defendant shall not commit another federal, state or local crime. He shall not unlawfully possess a controlled substance. He shall comply with the standard conditions of supervision, and he shall comply with the following additional conditions:

He shall not possess a firearm, destructive device or other dangerous weapon.

He shall submit to one drug test within 15 days after being placed on supervision and at least two periodic drug tests thereafter within 60 days.

The defendant shall pay any financial penalties imposed by this judgment which remains unpaid at the commencement of the term of supervised release.

He shall provide the probation officer with access to any requested financial information.

The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the . . . .

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
AT KALAMAZOO

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Case No. 1:99-CR-01-02

v.

JIMMY VALENTINE

Defendant Appellant.

MOTION FOR LEAVE OF COURT TO AMEND PURSUANT TO FEDERAL RULE 15(a) OF FEDERAL RULES OF CIVIL PROCEDURE

Now comes Jimmy Valentine (herein after Defendant), pursuant to Federal Rules of Civil Procedure 15(a). Requesting this honorable court to grant leave allowing Defendant amend his 28 U.S.C. 2255 motion with the Supreme courts decision of Blakely v. Washington, 2004, U.S. Lexis 4573

Rule 15(a) states "leave should be freely given when justice so requires. The government will not be prejudiced due to the government fully briefing the issue for this amendment, on direct appeal. Therefore, Defendant states as follow for his amendment:

The Trial court committed plain error by increasing Defendant's sentence, with drug amounts and enhancement for leadership without . . . . a jury

finding beyond a reasonable doubt, therefore violating his Sixth amendment right. In light of Blakely v. Washington, supra.

Defendant raised this issue on direct appeal under Apprendi v. New Jersey, which was denied. The Supreme court clarified Apprendi's holding in Blakely v. Washington, therefore, Defendant is forced to bring this issue on this amendment, to deny such a amendment would leave Defendant without any avenue to raise this issue, he could not meet the standards for successive motion therfore, in the interest of justice Defendant prays this court will grant leave in apply Blakely supra, to the case at bar.

Dated: 7-15-04 Respectfully submitted

Jimmy Valentine #09555-040
FCI Elkton
P.O. Box 10
Lisbon, Ohio 44432

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff, Case No. 1:99-CR-1-2
Hon. Richard Alan Enslen

vs.

JIMMY RAY VALENTINE

Defendant.

NOTICE OF APPEAL

Now comes Jimmy Ray Valentine (herein after Defendant), with this notice of appeal of the orders entered on August 6, 2004, denying motion to amend 28 U.S.C. 2255 and order entered on August 12, 2004 denying motion under 28 U.S.C. 2255, from the Western district of Michigan to the Sixth Circuit court of appeals.

Dated: 8-29-04 Respectfully submitted

Jimmy Valentine 09555-040
FCI Elkton
P.O. Box 10
Lisbon, Ohio 44432